89-1906

No. _____

In The

Supreme Court of the United States

October Term, 1989

SAMUEL DEUTSCH,

Petitioner,

vs.

ROBERT G. FLANNERY, ROBERT C. MARQUIS, RICHARD W. STUMBO, JR., WALTER G. TREANOR, JOHN G. BANNISTER, WAYNE T. DONNELS, JOHN G. MCDONALD, JUSTIN M. ROACH, JR., JOSEPH ROSENBLATT, THE WESTERN PACIFIC RAILROAD COMPANY, and UNION PACIFIC CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Does the Interstate Commerce Act impliedly repeal the Securities Exchange Act and confer exclusive jurisdiction upon the Interstate Commerce Commission to decide whether securities fraud has been committed in a completed tender offer involving carriers where such carriers seek its permission for a subsequent merger?

(2) Would a damage award under section 10(b) or 14(e) of the Securities Exchange Act for fraud in a tender offer be a collateral attack on a finding of the Interstate Commerce Commission that a merger proposal was "fair" to stockholders?

(3) In cases involving the merger of carriers, does the Interstate Commerce Act deprive federal courts of their exclusive jurisdiction to adjudicate pre-merger claims under the Securities Exchange Act?

(4) Is retroactive immunity from the anti-fraud and diclosure provisions of the Securities Exchange Act "necessary" for effectuating a permissive order of the Interstate Commerce Commission?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit, No. 88-2629, is reported at 883 F.2d 60, A-1. The Opinion of the United States District Court, Northern District of California (No. C-84-7928 SC), unreported, was rendered on April 8, 1988, A-9.

Prior opinions, not at issue herein, were delivered by the Ninth Circuit on July 31, 1987 (reported at 823 F.2d 1361), A-16, and by the District Court on May 1, 1985 (unreported), A-29.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 21, 1989. A timely Petition for Rehearing and Suggestion of Appropriateness for Rehearing En Banc was denied on March 9, 1990, A-37.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Interstate Commerce Act as well as the Securities Exchange Act and the regulations promulgated thereunder are set forth in the Appendix, A-38-58.

STATEMENT OF THE CASE

(1) Nature of the Case and Procedural Posture

On January 23, 1980, The Union Pacific Corp. ("Union Pacific") made a tender offer ("Offer") for all outstanding common stock of The Western Pacific Railroad Company ("Wespac") at $20 per share. The Offer – in furtherance of an Agreement of Merger ("Agreement") between the two companies – was successful, and about 77% of Wespac stockholders (including Samuel Deutsch, the petitioner herein) tendered their stock.

Since Union Pacific could not legally *control* Wespac without the ICC's permission, it placed the tendered stock in a

voting trust. Thereafter, Union Pacific and Wespac jointly applied to the ICC for permission to implement the Agreement, which contemplated a freezeout of the remaining Wespac stockholders at $20 per share. On October 24, 1982, the ICC granted that application.

Union Pacific and Wespac then sought and procured stockholder approval for the merger, as required under the Interstate Commerce Act (the "Commerce Act") as well as State law. From respondents' statements at that time, Deutsch discovered that the 1980 Offer was a fraud carried out through affirmative misrepresentations and non-disclosures of material facts. Invoking Section 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa (1988), he brought an action before the U.S. District Court, Northern District of California, asserting claims under Sections 10(b) and 14(e) thereof, 15 U.S.C. §§ 78j, 78n(e) (1988), and the common law.

Respondents moved to dismiss the action under Rule 12(b), Fed. R. Civ. P., for want of subject-matter jurisdiction, *inter alia*. The District Court granted the motion, and the Ninth Circuit affirmed.

The Ninth Circuit reasoned that the ICC had found in 1982 that "the $20 per share price for Wespac shares was 'fair and reasonable.' " A-3. Hence, under *Schwabacher v. United States*, 334 U.S. 182 (1948), Deutsch was precluded from seeking a higher price for his shares. Construing the Offer to be "an integral part" of the Agreement, A-8, the Ninth Circuit held that the ICC "clearly" had the authority under the Commerce Act, 49 U.S.C. § 11343(a)(3) (1988), to review the fairness of the Offer. A-8. Therefore, that Court held the instant action to be an impermissible collateral attack on the ICC Order of 1982.

Apart from fundamentally misconstruing the ICC's 1982 decision as well as its jurisdiction under the Commerce Act, the Ninth Circuit's decision plainly nullified the Exchange Act in cases involving carrier mergers. It converted the Commerce Act into an omnipotent immunizer with untrammelled power to decimate the rest of the statute book. If permitted to stand, it would effectively exempt carriers from the Exchange Act – nay, all laws save the

Commerce Act – irrespective of whether such exemption would have catastrophic consequences on the public, whether such exemption is *necessary* for enforcing the Commerce Act, or even whether the ICC considered any of the relevant issues. The decision is unsupported by precedent or principle, and directly contradicts congressional intent. In view of the decision's obvious potential for significant systemic mischief, this Petition ought to be granted.

(2) Facts

– Background: The Agreement

In January, 1980, Union Pacific and Wespac decided to merge, with Union Pacific acquiring all of Wespac's assets. For this purpose they executed the Agreement on January 22, 1980. Thereby, each outstanding Wespac share would be automatically converted into the right to receive $20.00 in cash. Union Pacific and Wespac would apply to the ICC for permission under the Commerce Act, 49 U.S.C. § 11343 to implement the Agreement.

The parties could terminate the Agreement by mutual consent, or unilaterally under certain conditions. Thus, Union Pacific could terminate the Agreement if Wespac breached its convenants therein, or if the ICC imposed unacceptable conditions. Either party could terminate it if (1) the ICC refused permission, or (2) the merger was not consummated by January 1, 1986, or (3) if Union Pacific did not own a majority of Wespac shares by March 1, 1981, or did not purchase any shares "pursuant to a cash tender offer to be commenced on or about January 23, 1980". In case of such termination, Wespac had the first option to repurchase its shares from Union Pacific at an arms'-length transaction.

– The 1980 Tender Offer –
The Transaction At Issue Herein

On January 23, 1980, Union Pacific commenced the Offer, which was to purchase all outstanding Wespac shares at $20 each. Acknowledging the application of the Exchange Act to the Offer, respondents made the requisite filings with

the Securities and Exchange Commission (Sch. 14D-1). They did not seek the ICC's permission before making the Offer or filing the 14D-1 statement.

At that time, respondents represented Wespac's book value to be $12.79 per share as of December 31, 1979. Union Pacific, which already owned about 10% of Wespac shares through open market purchases, desired to acquire the remaining shares. Emphasizing their full freedom of action with respect to the merger, respondents stated:

> Following the Offer and prior to the consummation of the Merger, [Union Pacific] may also consider whether to acquire some or all of the remaining shares through open market or private purchases, a further tender offer or by any other means deemed advisable. Any such purchases may be at prices higher or lower than the price of $20 per share under the Offer. Additionally, [Union Pacific] reserves the right to dispose of any or all shares acquired by it.

What respondents did not disclose was that Wespac's assets included 5,000 to 8,500 acres of surplus land unrelated to railroad operations. This land was carried on Wespac's books at about 10% of its fair market value, which exceeded $150 million (i.e., over $106 per share). Moreover, respondents did not disclose that the primary reason for the proposed transaction was to transfer this land to Union Pacific at rock-bottom prices. They also concealed their intention to sell this land systematically and siphon off the resulting profits to Union Pacific.

Similarly, respondents did not disclose that Wespac management would reap substantial personal profits from the transaction. For example, the individual respondents were to sell their then-unexercisable options back to Wespac for about $1.4 million. Respondent Flannery was to sell his Wespac stock to Union Pacific at $23.20 per share, instead of the $20.00 being offered to other stockholders.

Unaware of these facts, Deutsch and members of the putative class herein tendered about 77% of the outstanding

shares of Wespac. Union Pacific purchased these shares, and placed them in a voting trust so that it would not control Wespac without ICC permission – such control would have violated the Commerce Act, 49 U.S.C. § 11343.

– The 1982 ICC Proceedings

On September 15, 1980, Union Pacific and Wespac jointly sought the ICC's permission to implement the Agreement. *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific Railroad Company – Control Missouri Pacific Corporation and Missouri Pacific Railroad Company*, 366 ICC 458, 471 (1982). Since Union Pacific owned about 85% of Wespac's outstanding stock, 366 ICC at 632, such permission would enable it to freeze out the *minority* stockholders for $20.00 in cash.

In its 360 page decision, the ICC found the Agreement to be "fair", and permitted Union Pacific to implement it.

– The 1983 Freezeout and Merger

On May 2, 1983, Wespac sent a proxy statement to its shareholders seeking approval for the merger. In that statement, respondents reported that the ICC had permitted Union Pacific to implement the Agreement and had "approved the $20 cash price *to be paid in the Merger* as fair and reasonable." (emphasis added). Accordingly, each share not owned by Union Pacific or subject to appraisal would "automatically be converted into the right to receive $20 cash. . . ." Even so, respondents reiterated, Union Pacific was not obliged to proceed with the merger, and could abandon it at any time.

Respondents also disclosed – for the first time – facts concealed from the stockholders during the 1980 Offer: that Wespac's surplus land was worth over ten times their book value; that respondents always knew of such value due to periodic internal appraisal as well as phenomenal profits from sales; and that Wespac's directors and senior managers had profited substantially from the transaction.

Respondents scheduled a meeting of Wespac stockholders for approving the merger on May 24, 1983. Since

Union Pacific owned over 85% of the stock, approval was a foregone conclusion. Respondents held the stockholders' meeting as scheduled, and implemented the Agreement.

– History of this Action

On learning of respondents' fraud, Deutsch commenced the instant action on December 14, 1984. Respondents first moved for transfer on grounds of convenience and "interests of justice" or, alternatively, for dismissal on grounds of issue preclusion, statute of limitations, and insufficiency of service of process. The District Court granted the motion, and dismissed the action on the ground of issue preclusion. A-29. On appeal, the Ninth Circuit affirmed in part, reversed in part, and remanded. A-16.

Thereupon, respondents filed the instant motions to dismiss, this time on grounds of subject-matter jurisdiction, and statute of limitations, a ground raised but not decided in the earlier motion. As explained above, the District Court granted the motion for want of subject-matter jurisdiction, and refused to decide the limitations issue on that basis. The Ninth Circuit affirmed, and denied rehearing.

– Related Litigation, Contrary Decision

Wespac's non-tendering stockholders brought an action in the U.S. District Court, Southern District of New York. Based on misrepresentations during the Offer, they asserted 10b-5 claims, 17 C.F.R. 240.10b-5, amongst others, against Union Pacific and its officers. Union Pacific moved to dismiss those claims on the same grounds as asserted here. The New York Court, however, rejected that motion and upheld the 10b-5 claims. *Bruno v. Cook*, 660 F. Supp. 306, 309 (S.D.N.Y. 1987).

That Court reasoned that since the ICC had approved "the merger agreement as 'just and reasonable' *to minority shareholders*," 660 F. Supp. at 307 (emphasis added), the terms of the merger were not open to review. But that did not negate the federal securities claims:

> Although this court may not review the fairness of the merger agreement or the appropriateness of the

> \$20 per share price, it does have independent jurisdiction to adjudicate claims of fraudulent misrepresentations made in connection with the purchase or sale of securities.

Id. at 308.

Accordingly, that Court analyzed the 10b-5 claims. It held that the non-tendering stockholders could not complain about the fraudulent understatement of Wespac's assets in the Offer because they did not rely on it, and were not damaged by it:

> If plaintiffs had parted with their WesPac stock for \$20 based on a fraudulently low misstatement of the value of WesPac's assets, they could sustain a claim.

Id. at 309. Thus, only tendering stockholders had a 10b-5 claim on that ground.

Nevertheless, that Court upheld the non-tendering stockholders' 10b-5 claim based "upon defendants' alleged misrepresentation of their intentions concerning the availability of appraisal rights." *Id.* The non-tendering stockholders might be able to show that if they had known the facts regarding appraisal rights, they would have accepted the \$20 offer, and not held out "for a better award on appraisal . . . " *Id.* Therefore, the non-tendering stockholders might be entitled to "loss of interest" on this claim. *Id.*

After that decision, on or before August 14, 1989, Union Pacific agreed to pay up to an additional \$5.60 per share to those stockholders, towards the interest on \$20, in settlement of those claims. This settlement confirms that the ICC order had no effect whatsoever on 10b-5 claims, and respondents themselves understand it to be so.

REASONS FOR GRANTING THE WRIT

This Court ought to grant the instant Petition because the Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court. Contrary to well-settled law, *see, e.g., Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n.*, ___ U.S. ___, 109 S. Ct.

2584, 2596 (1989), the Ninth Circuit "picked and chose" among two federal statutes, enforcing one and simply ignoring the other. The singular significance of the statute ignored – the Exchange Act, which has long been considered the bulwark of protection for millions of innocent investors – highlights the need for this Court's intervention.

Besides, this Court ought to settle the extremely important questions of federal law raised by the Ninth Circuit's Opinion. These relate to the jurisdiction of the ICC over completed tender offers involving carriers, the scope of exemptions under the Commerce Act, and the distinction between a damage award under the Exchange Act and "fair price" under the Commerce Act.

Contrary to this Court's repeated reiteration that the fairness of a tender offer must be decided by stockholders alone, the Court below held that the ICC could decide that issue. Thereby, it created a needless conflict between the two statutes. Contrary to inveterate canons of statutory construction, the Court below found the Exchange Act to be repealed by implication in cases involving merger of carriers. Thereby, it negated explicit congressional intent to subject railroad securities to all the provisions of the federal securities laws. Contrary to consistent precedent, the Court below gave an over-broad reach to the exemption provision of the Commerce Act. Thereby, it enabled carriers subject to the ICC's jurisdiction to violate other laws with impunity.

Moreover, the lower Court did not consider whether retroactive immunity from sections 10(b) and 14(e) of the Exchange Act was "necessary" for implementing the ICC permitted Agreement. It did not distinguish between a damage award under the Exchange Act and a "fair price" approved by the ICC. Lastly, it deprived defrauded stockholders of significant rights under federal law without so much as a warning. These questions are too important to be left in the twilight zone that the Ninth Circuit's decision has cast them.

I. THE LOWER COURT'S DECISION CREATES AN UNWARRANTED CONFLICT BETWEEN THE COMMERCE ACT AND THE EXCHANGE ACT

As this Court stated recently:

> [W]e "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We should read federal statutes "to give effect to each if we can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988).

Pittsburgh and Lake Erie R.R. Co., 109 S. Ct. at 2596.

Accordingly, the Exchange Act as well as the Commerce Act must be fully enforced to the extent they coexist.* *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 172-73 (1962) ("The policies of [the Commerce Act] and the labor act necessarily must be accommodated, one to the other."); *United States v. Borden Co.*, 308 U.S. 188, 198-203 (1939). The ICC itself considers such an "accommodation of laws" as an "essential problem to be resolved in section 5 transactions . . . " *Southern Ry – Control – Central of Ga. Ry*, 331 ICC 151, 169-70 (1967).

Such an accommodation is clearly possible, since the Commerce Act covers issues concerning the capital structure and stability of carriers, while the Exchange Act covers issues concerning protection of public investors. No irreconcilable

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* Where federal law conflicts with state law, preemption principles govern. *Hayfield Northern R.R. v. Chicago and North Western Transp. Co.*, 467 U.S. 622, 627-37 (1984). However, where the conflict is with another federal law, principles of harmonious statutory construction govern. *In re Penn Central Transp. Co.*, 484 F.2d 323, 333 (3d Cir.), *cert. denied*, 414 U.S. 1079 (1973) (Bankruptcy Act harmonized with the Commerce Act). As this Court is well aware, these principles are significantly different.

conflict or "plain repugnance", *Gordon v. New York Stock Exchange Inc.*, 422 U.S. 659, 682-83 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963), exists between the two statutes.

The Ninth Circuit did not address this issue. But its decision manufactured a conflict between the two statutes because the Exchange Act confers "exclusive jurisdiction" on federal courts over claims thereunder. We show below that this conflict is totally uncalled for. Stockholders alone could decide the fairness of the tender offer price; this right is guaranteed by the Williams' Act. The Commerce Act clearly envisages the applicability of the Exchange Act, and reiterates the stockholders' right to decide the fate of a merger. Courts have consistently applied the Exchange Act to transactions regulated by other federal agencies, and the ICC is no different for this purpose. Therefore, the ICC has no jurisdiction to decide this issue, and no conflict exists between the two statutes.

A. Stockholders Have An Untramelled Right To Decide The Fairness Of A Tender Offer

– The Williams' Act Guarantee

The Williams' Act, which amended the Exchange Act, was meant to ensure adequate and truthful disclosure so that "shareholders have a fair opportunity to make their decision about the 'fairness' of a tender offer." H.R. Rep. No. 1711, 90th Cong., 2d Sess. at 4 (1968). As Justice White observed for this Court, "Congress intended for investors to be free to make their own decisions," *Edgar v. Mite Corp.*, 457 U.S. 624, 639 (1982). Justice Powell reiterated that understanding in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 83 (1987), where he approvingly observed while upholding Indiana's anti-takeover statute, "the Act allows *shareholders* to evaluate the fairness of the offer collectively." This fundamental premise of the Williams' Act is too well-settled to merit debate.

– The Commerce Act Guarantee

The Commerce Act recognizes this freedom of choice of investors by imposing the requirement of stockholder

approval over and above that of ICC authorization in cases of carrier consideration. 49 U.S.C. § 11341(a) (1988), A-49; *Schwabacher*, 334 U.S. at 194. As the D.C. Circuit Court observed:

> Although [the Commerce Act] scheme may be comprehensive, it is not exclusive. *See Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1098-99 (E.D. Pa. 1972) (holding that remedies under the Securities Act of 1933 would be available to purchasers of securities issued pursuant to Section 20a).

Ass'n of American R.R. v. United States, 603 F.2d 953, 959 n.15 (D.C. Cir. 1979). Thus, the investors' right under the Williams' Act to "decide, on their own, whether to accept or reject the tender offer," *Gunter v. AGO International B.V.*, 533 F. Supp. 86, 89 (N.D. Fla. 1981), is left untouched by the Commerce Act.

Clearly, Deutsch's right to decide the fairness of the Offer is absolute – even if we construe the ICC's 1982 order as including the Offer. He cannot be fraudulently deprived of this right. The Commerce Act as well as the Exchange Act mandate such a result.

B. The ICC's Permission Did Not Amount To An Adjudication Of Exchange Act Claims.

The ICC's 1982 permission entitled Union Pacific to freeze out the remaining stockholders. It did not amount to a post-hoc validation of Union Pacific's acquisition of title to the stock, land, or other property of Wespac.

Illustratively, in *United States v. I.C.C.*, 396 U.S. 491 (1970), plaintiffs challenged an ICC-permitted carrier merger on the ground, *inter alia*, that "the [ICC] had no authority to approve the proposed merger because [one of the participant carriers did] not own the franchise and right of way involved in the merger . . . " 396 U.S. at 525. This Court unequivocally rejected that challenge stating:

> The premise of [the plaintiffs'] position is that . . . before the [ICC] can assume jurisdiction over a

> merger application it must determine that the applicants have proper legal title to the rights and property which they seek to bring into the merger. This is an erroneous assumption. The [ICC] is not required to deal with the subtleties of "good title" before assuming jurisdiction [citations omitted] and because [an ICC] order "is permissive, not mandatory," *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27, 53 S.Ct. 45, 49 (1932), the approval of a merger proposal does not amount to an adjudication on any such questions. ***These are matters for the courts, not for an agency that has responsibility in the realm of regulating transportation systems.***

396 U.S. at 526 (emphasis added).

So also, after an extensive analysis of the law, the Fifth Circuit held in *Texas and New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen*, 307 F.2d 151, 160 (5th Cir. 1962) *cert. denied*, 371 U.S. 952 (1963):

> [T]he [ICC] is of the opinion that the carriers must rely upon applicable contract and corporate law to carry their . . . transaction into effect, and may not rely upon the [ICC's] 'approval' to coerce a recalcitrant party into line. Further, we feel that it would be inconsistent with this construction of the statute to hold that . . . other non-carrier parties are bound without their consent by the [ICC's] permissive approval.

Thus, the ICC was not required to and did not discuss respondents' compliance with the Exchange Act before it assumed jurisdiction over their application. Consequently, its permission to implement the Agreement was not an adjudication on such questions.

C. The ICC Has No Jurisdiction Over Tender Offers.

The lower Court held that the ICC had jurisdiction to decide the fairness of the Offer because "it was an integral part of the Agreement of Merger, not a discrete, unrelated

transaction." A-8. According to that Court, the ICC's jurisdiction rested on the fact that the Offer "was part of a transaction by which one carrier acquired control of another." *Id.*

That reasoning is fundamentally erroneous. Assuming without conceding that the Offer was an "intergral part" of the "transaction," it was certainly not a part for which respondents required – or sought – the ICC's permission. While everything mentioned in the Agreement could be considered an "integral part" of the transaction, the ICC's imprimatur cannot be the final word on them. For example, the Agreement contained convenants about Union Pacific's incorporation in Utah, Wespac's incorporation in Delaware, corporate authority of the two carriers, and Wespac's title to its properties. To suggest that these aspects are beyond challenge simply because they were an "integral part" of the ICC-permitted transaction is to convert the ICC into an extra-constitutional pocket of authority, a "supercourt." Thus, the Offer's being an "integral part" of the Agreement is simply irrelevant.

The scheme of the Commerce Act clarifies that the ICC has no jurisdiction over tender offers. The ICC exercises "exclusive" jurisdiction over certain types of carrier consolidations. 49 U.S.C. § 11341 (1988), A-49. Once the ICC permits such a consolidation, a participating carrier is exempted from "all other law . . . as necessary . . . to carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Id.* However, the criteria which the ICC must consider for granting such permission do not involve Exchange Act issues like national trading of securities, use of fraudulent schemes, or materiality of concealed facts. 49 U.S.C. §§ 11344(b)(1), 10101a (1988), A-55, 44.

The only jurisdiction the ICC enjoys over carrier securities is with respect to initial issuances under certain circumstances. Even in such cases, the transactions are subject to the federal securities laws. 49 U.S.C. § 11301(b)(1) (1988) A-46-47; *Shofstall v. Allied Van Lines, Inc.*, 455 F. Supp. 351 (N.D. Ill. 1978) (ICC authorized stock issuance subject to dividend restriction; non-disclosure of restriction did not invalidate stock issuance under the Commerce Act, *id.* at 357,

but did state 10b-5 claim, *id.* at 355-56); *Ass'n of American R.R.*, 603 F.2d at 959 n.15 (D.C. Cir. 1979); *Dorfman v. First Boston Corp.*, 336 F. Supp. 1089, 1098-99 (E.D. Pa. 1972). *See also* 49 U.S.C. § 11367 (1988), A-58 (changes in capital structure exempt specifically from Section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a). No exemption from anti-fraud provisions).

D. The Exchange Act Has Been Consistently Applied in Other Regulated Transactions.

Emphasizing the significance of the Exchange Act, courts have zealously enforced claims thereunder, with Rule 10b-5 consistently commanding expansive coverage. *See e.g., Tcherepnin v. Knight*, 389 U.S. 332, 336-38 (1967). Indeed, one court has considered Rule 10b-5 to be "one of the most significant developments in the world of commerce in the twentieth century." *Shermer v. Baker*, 472 P.2d 589, 592 (Wash. App. 1970); *see also Washington Public Utilities Group v. U.S. Dist. Court*, 843 F.2d 319, 328 (9th Cir. 1987).

Consistent with such liberal coverage, courts have not exempted *any* issuer from the requirements of the Exchange Act. For example, as the Seventh Circuit observed, "[a]lthough banks and life insurance companies are subject to stringent regulation," their securities are still subject to the anti-fraud provisions of the Exchange Act. *Daniel v. Int'l Brotherhood of Teamsters*, 561 F.2d 1223, 1248 (7th Cir. 1977) *rev'd on other grounds*, 439 U.S. 551 (1979). Similarly, even securities which were not subject to the registration requirements of the Securities Act of 1933 – before the enactment of 15 U.S.C. § 77c(a)(6) by the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 ("4R Act") – were still subject to the Exchange Act's proscriptions. *Daniel*, 561 F.2d at 1248; *Ass'n of American Railroads*, 603 F.2d at 959 n.15 (D.C. Cir. 1979). As SEC Chairman Ray Garrett observed while testifying in connection with the Regulated Carriers Financial Stability Act, S. 3356,

> [T]he remedies available under what we generally describe as the anti-fraud provisions of the Securities Act and the Securities Exchange Act, section 17

> of the Securities Act as well as section 10(b) of the Securities Exchange Act and rule 10b-5 thereunder, do apply to railroad securities. The exemption provided by section 3(a)(6) of the Securities Act reaches only the registration requirement of that Act. It does not exempt railroad securities from the antifraud provisions. We are proceeding in our civil lawsuit against Penn Central, and related persons and companies, on the ground that they violated the general antifraud provisions of the Federal Securities laws. . . .

Hearing On S. 3356 (Regulated Carriers Financial Stability Act) Before the Surface Transportation SubCommittee of The Committee on Commerce, S. Rep. No. 118, 93d Cong., 2d Sess., 78 (1974).

Indeed, the decision of another panel of the Ninth Circuit itself is extremely instructive. In *Rembold v. Pacific First Federal Sav. Bank*, 798 F.2d 1307 (9th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987), that Court considered claims under Section 10(b) of the Exchange Act, amongst others, arising from misrepresentations and concealments in a "Subscription Offering Circular." That Circular was offered by a Bank in furtherance of the FHLBB's approval (under the National Housing Act of 1934, 12 U.S.C. § 1725(j)) of the Bank's conversion "from a mutual to a stock form of organization." 798 F.2d at 1308. The Bank had filed copies of the Circular with the FHLBB as required, 12 C.F.R. § 563b.8(3). The district court dismissed the action for want of subject-matter jurisdiction, because the Housing Act vested review of the FHLBB's order in the Court of Appeals, 12 U.S.C. § 1730a(k). 798 F.2d at 1309.

The Court of Appeals reversed. It found that the Housing Act did not repeal the Exchange Act explicitly or impliedly, and was not incompatible with its "anti-fraud provisions". 798 F.2d at 1310. First, the Housing Act made "no reference to the right to maintain a private cause of action . . . by a person who has suffered damages as the result of misrepresentations in a *stock offering circular*." 798 F.2d at 1311

(emphasis in original). Second, the FHLBB was not responsible "for the accuracy of any information contained in offering circulars." *Id.* Therefore, the FHLBB's approval could not "relate in any way to" a 10b-5 plaintiff's right to recover damages from the Bank for misrepresentations in the Circular. *Id.* Third, the Housing Act imposed a 30-day limitation period for seeking review of the FHLBB's order. Since securities may often be sold after this limitation period, applying the Housing Act to 10b-5 claims would lead to "an unreasonable and unjust result." Therefore, the Ninth Circuit upheld subject-matter jurisdiction under the Exchange Act. *Id.*

The same considerations apply in the case at bar. Like the Housing Act, the Commerce Act did not repeal the Exchange Act and is not incompatible with it. Like the Housing Act, the Commerce Act does not provide redress for securities fraud; indeed, the Commerce Act's subchapter at issue does not authorize "a private civil damage action for violation of its provisions." *Kraus v. Santa Fe Southern Pacific Corp.*, 878 F.2d 1193, 1197 (9th Cir. 1989). Like the FHLBB under the Housing Act, the ICC under the Commerce Act is not responsible for the accuracy of any representations in the tender offer document at issue here.* Lastly, the Commerce Act carries a 60-day limitation period for seeking review of the ICC's order, 28 U.S.C. § 2344, and the only appellate forum is in Washington, D.C. *Simmons v. I.C.C.*, 716 F.2d 40, 42 (D.C. Cir. 1983). Securities transactions pertaining to ICC-permitted proposals take place much beyond this period; the Wespac freezeout itself occurred much later. Given the Exchange Act's wide venue provisions, *Securities Investor Protection Corp. v. Vigman*, 764 F.2d at 1309, 1317 (9th Cir. 1985) forcing small investors everywhere to litigate in the capital under such time constraints is certainly "unjust and unreasonable."

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* While the FHLBB regulations required that the Circular in *Rembold* be filed with the FHLBB, ICC regulations did not even require that the Offer documents be filed with the ICC. In fact, regulations under the Exchange Act required a 14D-1 filing with the Securities and Exchange Commission before the Offer, *supra* at 4. Respondents complied with this

(Continued on following page)

Thus, the Exchange Act applies *proprio vigore* to securities transactions irrespective of ICC involvement. The Commerce Act recognizes and contemplates this. The SEC's views have also long been consistent. No conflict exists between the two statutes at all, and the Ninth Circuit did not even consider this. Therefore, this Court ought to grant the Petition to consider whether the Exchange Act may be so cavalierly cast aside.

II. THE LOWER COURT'S DECISION THAT THE EXCHANGE ACT IS IMPLIEDLY REPEALED BY THE COMMERCE ACT IS CONTRARY TO EXPLICIT CONGRESSIONAL INTENT

Since the Commerce Act did not explicitly repeal the Exchange Act, the Court of Appeals' judgment is tantamount to a conclusion that it did so by implication.* Such a result is totally untenable, and the Ninth Circuit's failure to address the relevant issues only highlights this.

To begin with, it is "a cardinal principle of statutory construction that repeals by implication are not favored." *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987). Such a repeal is found in two categories of cases:

> (i) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (ii) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the

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(Continued from previous page)

regulation. They did not seek ICC approval before making the Offer or filing the 14D-1 with the SEC.

* The Ninth Circuit did not base its decision on any specific aspect of the claims at issue herein. Therefore, its decision appears to cover all claims under the Exchange Act.

> earlier act. ***But, in either case, the intention of the legislature to repeal must be clear and manifest. . . . Posadas v. National City Bank,*** 296 U.S. 497, 503.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (emphasis added).

We have already shown that the statutes at issue are not at all irreconcilable. That apart, both statutes have been repeatedly amended, and we cannot intelligibly talk of one as being "later" than the other. They also cover totally different subjects. Therefore, neither of the two *Radzanower* categories covers the case at bar.

Most important, far from intending to repeal the Exchange Act, Congress has *clearly* stated its intention to subject all railroad securities to the provisions of the Exchange Act irrespective of the ICC's involvement in a transaction. The legislative history of the 4R Act repeatedly evidences this.

Prior to the 4R Act, carrier securities which were subject to ICC jurisdiction were exempt from certain provisions of the Securities Act of 1933. *See* 15 U.S.C. § 77c(a)(6). Even at that time, they were subject to Sections 10(b) and 14(e) of the Exchange Act. *Memorandum prepared by the SEC for the House of Representatives Committee on Interstate and Foreign Commerce and Committee on Public Works and Transportation with respect to H.R. 9802: Report of the House Committee on Interstate and Foreign Commerce,* H.R. Rep. No. 725, 94th Cong. 1st Sess. 266 at 269 (1975). In enacting the 4R Act, Congress removed even those limited exemptions. While this removal itself speaks volumes about congressional intent, the legislative history is even more explicit. *See, e.g., Staff Study on the Inadequacies of Protections for Investors in Penn Central and other ICC-regulated Companies,* Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce, 92d Cong., 1st Sess., (Comm. Print 1971); H.R. Rep. No. 725, 94th Cong., 1st Sess.; 66-68 (1975). S. Conf. Rep. No. 595, 94th Cong., 24th Sess. 183 (1976). In the face of such repeated pronouncements, legislative intent is not even arguable.

The Ninth Circuit's decision frustrates explicit congressional intent. Therefore, the Petition ought to be granted so that this needless collision between the courts and the legislature may be avoided.

III. THE LOWER COURT'S DECISION THAT THIS ACTION IS A COLLATERAL ATTACK ON THE ICC'S ORDER IS CONTRARY TO WELL-SETTLED PRECEDENT

The Courts below did not hold, and respondents did not contend, that it was "necessary" to exempt Union Pacific from liabilities incurred under the Exchange Act in 1980 in order to implement the ICC-permitted Agreement in 1983. The Courts below did not hold, and respondents did not contend, that the ICC had decided whether respondents employed a fraudulent scheme in 1980. The Courts below did not hold, and respondents did not contend, that the ICC had decided whether respondents' disclosures met the requirements of the Williams Act. Nevertheless, the Courts below did hold, and respondents have contended, that the remedy sought by Deutsch is an impermissible collateral attack on the ICC's Order because the ICC "decided" that the Offer price was "fair."

As we show herein, that holding runs directly contrary to precedent. The measure of damages for violation of Sections 10(b) or 14(e) of the Exchange Act is clearly distinguishable from the methodology for determining "fair price" under the Commerce Act. Even otherwise, damages (or other remedies) may be awarded for enforcement of the Exchange Act. Therefore, the district court's exercise of its "exclusive jurisdiction" under the Exchange Act is not a forbidden redetermination of anything decided by the ICC.

A. "Damages" Under the Exchange Act Are Different From "Fair Price" Under The Commerce Act.

Damages under the Exchange Act are significantly different from "fair price" determined by a regulatory agency for purposes of other statutes. This is because stockholders are

entitled to more than *any* price which may be "fair": they are entitled to the *best* price they can obtain for their stock. Therefore, while $20 might be within the range of "fairness", it does not preclude a Court from awarding damages under the Exchange Act.

Indeed, the Ninth Circuit's own decision in *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986) is illustrative. Like Union Pacific in the case at bar, in that case, Natomas made a tender offer for another company, pursuant to which it purchased an overwhelming majority (83%) of the stock. *Id.* at 716. Like Union Pacific in the case at bar, Natomas sought to freeze out the remaining stockholders at the same price as the offer price. Thereafter, like the ICC acting under federal law in the case at bar, the California Corporations Commissioner, acting under state law, determined that the merger price was "fair" to the minority stockholders. *Id.* Like Deutsch in the case at bar, Plaine sued in federal court alleging violations of Section 14(e) of the Exchange Act. Like the Courts below in the case at bar, the district court dismissed the action, holding that the Commissioner's decision precluded Plaine from asserting that the price she received was unfair. *Id.*

On appeal, the Ninth Circuit reversed. Citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), that Court held that stockholders cannot be presumed to be willing to accept every "fair" merger:

> [S]hareholders can be injured in ways other than by receiving an "unfair" price for their shares. While the issue of fairness is relevant to the issue of damages, it does not necessarily defeat a plaintiff's claim of injury.

797 F.2d at 721.

Besides, that Court held, what is "fair" under California law is different from "the question of value" for purposes of the Williams Act:

> The damages awarded a successful section 14(e) plaintiff . . . may go beyond a determination of a "fair price." The purpose of the 1934 Act is to compensate plaintiffs injured by violations of federal securities laws whether the measure of damages

> is out-of-pocket loss, benefit of the bargain, or some other appropriate standard.

797 F.2d at 722 (citation omitted). For example, Carol Plaine could show that adequate disclosures would have strengthened stockholders' bargaining position, resulting in a higher price. *Id.* Thus, even though Plaine herself did not rely upon the misleading document and tender her shares, the Ninth Circuit reinstated her action.

The Ninth Circuit distinguished the instant case on the ground that the *Plaine* merger "was not subject to ICC review and approval," A-7-8, and that *Plaine* did not involve 49 U.S.C. § 11341(a), *id.* That distinction misses the point, which is that a damage award under Section 10(b) or 14(e) of the Exchange Act is not inconsistent with an administrative agency's finding of "fair price." Whether the agency involved operates under federal or state law is irrelevant for this purpose.

B. Enforcement of the Exchange Act Does Not Impinge Upon The Commerce Act.

Clearly, the two statutes at issue govern totally different areas. Since the statutes are not in conflict, as seen earlier, remedies which might be necessary for enforcement of the Exchange Act do not impinge upon the Commerce Act. Therefore, even assuming without conceding that "damages" and "fair price" are the same, a damage award herein would not negate the Commerce Act, as this Court held in *Securities and Exchange Comm'n v. National Securities, Inc.*, 393 U.S. 453 (1969).

That decision considered an SEC action to unwind a merger, approved by the Arizona Director of Insurance, for violation of Section 10(b) of the Exchange Act. Despite the McCarran-Ferguson Act's explicit prohibition of any statutory construction which may "invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance", 393 U.S. at 457, this Court upheld the action.

This Court reasoned that the merger *per se* was not under attack; the misrepresentations that resulted in the merger

were. The Exchange Act attempted to protect the investors, while the Arizona statute sought to protect the policyholders. Arizona had not commanded something which the federal law prohibited; it merely "permitted respondents to consummate the merger." 393 U.S. at 463. Finding the Exchange Act and the Arizona statute perfectly compatible, this Court held:

> In these circumstances, there is no reason to emasculate the securities laws by forbidding remedies which might prove to be essential.

Id. It, therefore, remanded the matter to the trial court, observing that the merger could be wholly unwound if necesary.

The case at bar involves the Commerce Act, which is concerned with the provision of adequate and efficient transportation to the public. Like the Arizona Director of Insurance in the *National Securities* case, the ICC also merely permitted respondents to consummate the merger; it did not order them to do so. *United States v. I.C.C.*, 396 U.S. 491 (1970)(ICC order is merely permissive, not mandatory). Like the Arizona Director of Insurance in the National Securities case, the ICC did not pass upon the adequacy or truthfulness of the disclosures. Like the Arizona Director of Insurance in the *National Securities* case, the ICC did not decide whether respondents had employed a manipulative scheme.

The only significant difference between the *National Securities* case and the case at bar is that the former necessarily implicated the permitted merger, while the latter does not. Since this Court permitted the action to proceed in the former case, the same result should follow herein.

C. The Issues Herein Are Totally Different From Those Ruled Upon By The ICC.

Administrative determinations usually have Res Judicata effect "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966). The ICC decision of 1982 does not even come close to meeting this test with respect to Deutsch's

claims. Therefore, the ICC's finding of fairness – if any – cannot preclude the court from considering the claims herein.

The transaction at issue herein is the tender offer of 1980, whereby Union Pacific acquired 77% of Wespac stock. Among the major issues that have to be resolved by the federal court are the following: whether a fraudulent scheme was employed in connection with the tender offer, and if so by whom; whether respondents had the requisite "scienter" for liability under Section 10(b); and whether the information that respondents failed to disclose, or disclosed misleadingly, was "material" for purposes of Section 14(e) of the Exchange Act. Each of these issues must be resolved with reference to the facts as they existed in 1980, and without recourse to the subsequent proceedings before the ICC, or the freezeout.

In contrast, the transaction at issue before the ICC was the implementation of the Agreement. Among the major issues to be resolved by the ICC were whether the Agreement was in the public interest; whether it would further the federal policy of safe, adequate and efficient transportation; and whether it had significant anti-competitive effects. None of these involved the protection of public investors who were defrauded into selling their stock.

Indeed, the distinction between acquisition of stock, the fundamental issue herein, and acquisition of control, the fundamental issue before the ICC, is well settled under the Commerce Act. As the D.C. Circuit explained in *Water Transport Ass'n v. I.C.C.*, 715 F.2d 581 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984), because of the long delay involved in procuring ICC approval,

> [M]erging carriers often have an economic incentive to complete the transaction first and seek ICC approval later. The ICC has long permitted carriers to do this by use of an independent voting trust. *If the acquiring carriers put the stock of the acquired carriers in an independent voting trust, the ICC holds that the transaction does not violate § 11,343 because the acquiring carrier does not "control" the acquired carrier.*

715 F.2d at 582 (emphasis added). *Also see Reliance Group Holdings, Inc., Petition for Declaratory Order,* 366 ICC 446, 453 (1982). Thus, the independent voting trust is used to insulate the acquisition of stock from the acquisition of control. *Guidelines for the Proper Use of Voting Trusts,* 49 C.F.R. 1013.1.

That is precisely what happened in the case at bar. Union Pacific distanced itself from control by placing the stock in a voting trust, consistent with well-settled precedent. *See, e.g., B.F. Goodrich Co. v. Northwest Industries, Inc.,* 303 F. Supp. 53, 58-61 (D. Del. 1969), *aff'd,* 424 F.2d 1349, 1357 (3d Cir.), *cert. denied,* 400 U.S. 822 (1970); *Amoskeag Co. v. I.C.C.,* 590 F.2d 388, 391 n.3 (1st Cir. 1979). *See also Alleghany Corp. v. Breswick & Co.,* 353 U.S. 151, 169, *reh'g denied,* 353 U.S. 989 (1957) (test to determine acquisition of control for purposes of Interstate Commerce Act). What it took before the ICC was the issue of its acquisition of control over Wespac, and the implementation of the Agreement. It did not seek the ICC's opinion about its prior purchase of Wespac stock – which occurred through the Offer as well as open market.

Besides, the interests involved herein are those of tendering stockholders, whereas the ICC was concerned with the interests of the *minority* stockholders. By definition, this "minority" consisted of the non-tendering stockholders. They did not and could not represent Deutsch and other tendering stockholders. Indeed, the latter had no interests to be represented before the ICC, having sold their interests to Union Pacific in 1980. Subsequent proceedings initiated by the minority stockholders in New York demonstrate this forcefully: the New York Court did not permit them to litigate 10b-5 claims based on understatement of Wespac's assets during the Offer since they had not tendered their shares based on such understatement. *Bruno,* 660 F. Supp. at 309.

Thus, the issues and interests which were considered by the ICC were different from those raised herein. They were concerned with the fairness of the Agreement, not that of the Offer. Therefore, a decision on Deutsch's claims herein would not be a collateral attack on the ICC Order. The lower court's

decision to the contrary gives an unwarranted reach to the ICC's permissive order. If permitted to stand, it would expand the concept of "collateral attack" to hitherto unheard of limits. Given the innumerable regulatory agencies operating today, this could strip millions of unsuspecting citizens of their day in court – an unshakeable pillar of our Republic.

IV. THE LOWER COURT'S DECISION GIVES OVERBROAD SWEEP TO THE EXEMPTION PROVISION OF THE COMMERCE ACT

While the ICC enjoys broad powers to immunize transactions, the statute qualifies this power explicitly by a "necessity component." *Brotherhood of Locomotion Eng'rs v. I.C.C.*, 761 F.2d 714, 717 (D.C. Cir 1985) *vac. on other grounds*, 482 U.S. 270 (1987). Furthermore, the power to immunize – the "implied repeal" provision – is subject to a narrow construction. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981).

The Ninth Circuit's judgment effectively obliterates the necessity component out of the statute. Such a reading is against well-settled canons of statutory construction: statutes ought *not* to be construed in a way that limiting language is rendered superfluous. *National Insulation Transp. Comm. v. I.C.C.*, 683 F.2d 533, 537 (D.C. Cir. 1982); *Texas & New Orleans R.R. Co.*, 307 F. 2d at 159-60.

A. The Issue Should Be Specifically Addressed By the Court.

Obviously, a claim for exemption from a statute is not to be lightly inferred. Courts have an obligation to consider the parameters of the exemption, and the requirements of the statute. As Justice Stevens (for himself, and Brennan, Marshall, and Blackmun, JJ.) stated categorically.

> Any tribunal that is faced with a claim that a party is violating some "other law" has the responsibility of determining whether an exemption is "necessary to let that person carry out the transaction, hold,

> maintain, and operate property, and exercise control or franchises acquired through the transaction." 49 U.S.C. § 11341

I.C.C. v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 300 n. 13 (1987). The Ninth Circuit did not determine whether respondents needed a retroactive exemption from Sections 10(b) and 14(e) of the Exchange Act to carry out the ICC permitted freezeout.

B. Even The ICC Had No Power To Exempt Respondents From Liabilities Incurred Under The Exchange Act.

The scope of the ICC's power to grant exemptions was considered extensively in *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). In that case, the ICC had specifically voided a pre-existing contract between MoPac (a carrier) and the City, while permitting a merger involving MoPac. Refusing to uphold the ICC's "gratuitous[ ] relie[f] [of the carrier] of its contractual obligations," *id.* at 414, the Court observed:

> In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger.

Id. Therefore, the ICC had no power to void the contract because, although a burden on MoPac, the contract was not an obstacle to the merger. *Id.*

The Ninth Circuit distinguished the instant case on the ground that *City of Palestine* involved "preexisting contractual obligations that were unrelated to the merger transaction under ICC review." A-7. The distinction is tenuous, because the thrust of *City of Palestine* was that the ICC's authority was restricted by what was "germane to the success of the approved . . . transaction." 559 F.2d at 414. Certainly, violation of anti-fraud and disclosure laws were not "germane" to respondents' implementation of the Agreement. As Justice Stevens observed in the *Brotherhood* case, speaking for four judges of this Court (including himself), "The breadth of the

exemption is defined by the scope of the approved transaction. . . . " 482 U.S. at 298.

Thus, the issue is whether the scope of the permitted transaction – i.e., implementation of the Agreement – included retroactive immunity from anti-fraud and disclosure provisions of the Exchange Act. To pose this question is to answer it: All that the Exchange Act requires is, in the language of *Securities & Exchange Comm'n*, 393 U.S. at 463, that carriers "speak the truth when talking to their shareholders." Surely, that cannot be considered to "interfere" with the "success" of the permitted transaction.

Besides, the plain meaning of "necessary"* requires a finding of indispensability. Several decisions support such a strict construction. *Brotherhood of Ry. Carmen v. I.C.C.*, 880 F. 2d 562 (D.C. Cir. 1989) (Exemption does not extend to contractual rights); *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949) (Exemption applies to "state laws *interposing obstacles in the path* of otherwise lawful plans of reorganization", emphasis added); *Seaboard Airline R. Co. v. Daniel*, 333 U.S. 118, 125 (1948) (ICC has power to "override state laws which may interfere with efficient and economical railroad operation"); *Texas v. United States*, 292 U.S. 522, 534-35 (1934) ("The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan"); *Texas and New Orleans R.R. Co.*, 307 F.2d 151, (Norris-LaGuardia Act not "a legal restraint or limitation on the carriers and their ability to carry out an approved transaction," *id.* at 156; however, ICC may relieve carriers of *particular* demands which were "contrary to the public interest in the effectuation" of the transaction, *id.* at 161); *Brotherhood of Locomotive Eng'rs v. Chicago and North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) (Exemption "to the extent necessary to

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* "That which cannot be dispensed with; essential; indispensable . . . " *Webster's New Universal Unabridged Dictionary* (2d ed. 1979).

carry out the merger"); *Brotherhood of Locomotive Eng'rs v. Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir.), *cert. denied*, 479 U.S. 829 (1986) (Exemption "from legal obstacles that would impede . . . fruition").

Thus, courts have consistently interpreted the necessity component of the Commerce Act in the context of the permitted transaction. No other court has construed Section 11343 as conferring pontifical powers of purification upon the ICC, whereby the participants in a permitted transaction are absolved of the consequences of all prior legal sins.

V. THE LOWER COURT TOTALLY MISCONSTRUED *SCHWABACHER*

The Ninth Circuit's construction of *Schwabacher*, 334 U.S. 182 (1948) – is totally misconceived. The *Schwabacher* appellants owned preferred stock in one of the merging carriers. Under the ICC permitted transaction, they received stock valued between $90 and $111 in exchange. They contended that since the corporate existence was terminated by the merger, under Michigan law they had the right to receive at least $172.50 including unpaid dividends. The ICC left this claim open for litigation.

This Court held that the ICC could not do so, because the Commerce Act accorded no recognition to state law rights of appraisal. Therefore, "approval of a voluntary railroad merger which is within the scope of the act is dependent upon three, and upon only three" factors: public interest, justice and reasonableness, and consent of majority of stockholders. 334 U.S. at 194. In appraising a stockholder's claim in a merger, the ICC had to determine "what value he is contributing to the merger that is to be made good." 334 U.S. at 199. This must be decided exclusively under federal law by the ICC. *Id.*

Claims under Sections 10(b) and 14(e) of the Exchange Act do not arise out of the "capital structure" of a company.

Indeed, they are totally independent of each other. Moreover, "the value of a stockholder's contribution to a merger must be determined in accordance with the . . . worth of the shareholders' contributions at the time of submission of the proposal to the ICC", absent material subsequent changes. *United States v. I.C.C.*, 396 U.S. at 522. When respondents submitted their merger proposal to the ICC, Deutsch was *not* a stockholder; he had already tendered his shares. Deutsch's claims do not pertain to "the value" he contributed to the ICC permitted merger; the only persons contributing value were Union Pacific, which held 85% of Wespac's stock, 366 ICC at 632, and the minority stockholders, who had not been misled. Lastly, even otherwise, *Schwabacher* upheld stockholders' right to reject an ICC-permitted merger.

Clearly, the Commerce Act does not bar defrauded tenderer's claims, just as it does not bar tort claims. *See Kraus*, 878 F.2d at 1199 (claim for tortuous interference with economic relationships under Oregon law not barred by the Commerce Act because "a violation of [section 11343] is [not] an essential element of the . . . claim."). The ICC itself has construed *Schwabacher* to apply only where the proposed transaction involves "compulsion through liquidation of shareholder interests." *New York Dock Railway – Control – Brooklyn Eastern District Terminal*, 354 ICC 399 (1978). The Opinion, thus, gives an overbroad and unwarranted sweep to *Schwabacher*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Dated: June 5, 1990.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL DEUTSCH, *Plaintiff-Appellant,* v. ROBERT G. FLANNERY, ROBERT C. MARQUIS, RICHARD W. STUMBO, JR., WALTER G. TREANOR; JOHN G. BANNISTER; WAYNE T. DONNELS, JOHN G. McDONALD; JUSTINE M. ROACH, JR.; JOSEPH ROSENBLATT; THE WESTERN PACIFIC RAILROAD COMPANY; UNION PACIFIC CORP., *Defendants-Appellees.*	No. 88-2629 D.C.No. CV-84-7928-SC OPINION

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted
April 13, 1989 – San Francisco, California

Filed August 21, 1989

Before: William A. Norris, Robert R. Beezer and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Norris

SUMMARY

Corporations and Business Organizations/Jurisdiction

Affirming the district court's dismissal for lack of subject matter jurisdiction, the court held that 49 U.S.C.

§ 11341(a) of the Interstate Commerce Act exempts a railroad merger from attack under all other laws, including the federal securities laws, once it has been approved by the ICC.

Appellant Samuel Deutsch, former shareholder of Western Pacific Railroad Company, tendered his shares in response to Union Pacific Corporation's tender offer in an ICC-approved merger agreement between the two companies. Afterward Deutsch brought an action claiming that Union Pacific, WesPac, and WesPac's former directors violated sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and Rule 10b-5 by designing and executing a scheme to allow Union Pacific to acquire WesPac at a dishonestly low price. The district court dismissed the action for lack of subject matter jurisdiction. [1] The Supreme Court held in *Schwabacher v. United States*, 334 U.S. 182 (1948), that Michigan law claims could not be maintained if their resolution might lead to a share price that exceeded what the ICC found to be just and reasonable. [2] Appellant's attempt to distinguish *Schwabacher* was to no avail. [3] Appellant argued that section 11341(a) does not apply because the ICC had no jurisdiction to review the fairness of Union Pacific's tender offer as it was not part of the merger transaction. The tender offer was the first step in the transaction, an integral part of the Agreement of Merger, not a discrete, unrelated transaction. The ICC clearly had the authority to review the tender offer because it was part of a transaction by which one carrier acquired control of another.

COUNSEL

Richard M. Meyer, Milberg, Weiss, Bershad, Specthrie & Lerach, New York, New York, for the plaintiff-appellant. John F. Collins, Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York; Kurt W. Melchior, Nossaman, Guthner, Knox & Elliott, San Francisco, California; T. Barry Kingham, Curtis, Mallet-Prevost, Colt & Mosle, New York, New York, for the defendants-appellees.

OPINION

NORRIS, Circuit Judge:

In 1980 Union Pacific Corporation ("Union Pacific") and Western Pacific Railroad Company ("WesPac") entered into an Agreement of Merger which provided that Union Pacific, which already owned 10% of WesPac stock, would make a tender offer for the remaining 90% of WesPac stock at $20 per share. The Agreement of Merger further provided that the tender offer would be followed by a back-end cash out merger of non-tendering shareholders, also at $20 per share. In response to the tender offer, 77% of the WesPac stock was tendered, leaving 13% in the hands of non-tendering shareholders. Union Pacific and WesPac then applied to the Interstate Commerce Commission ("ICC") for approval of the merger transaction pursuant to the Interstate Commerce Act, which prohibits the acquisition of one rail carrier by another without ICC approval. 49 U.S.C. § 11343(a)(3)(1982). The ICC approved the transaction in 1982, finding, *inter alia*, that "the terms of the UPRR-WPRR transaction are just and reasonable" and that the $20 per share price for WesPac shares was "fair and reasonable". *Union Pacific*

Corp., Pacific Rail System, Inc. and Union Pacific R.R. – Control – Missouri Pacific Corp. and Missouri Pacific R.R., 366 I.C.C. 459, 638 (1982). In *Southern Pacific Transp. Co. v. I.C.C.*, 736 F.2d 708 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985), the ICC order approving the transaction was reviewed and upheld.

Appellant Samuel Deutsch is a former shareholder of WesPac who tendered his shares in response to Union Pacific's tender offer. In 1984 he brought this action in the Northern District of California claiming that Union Pacific, WesPac and WesPac's former directors violated sections 10(b) and 14(e) of the Securities Exchange Act of 1934 and Rule 10b-5 by designing and executing a scheme to allow Union Pacific to acquire WesPac at a dishonestly low price.[1] Specifically, appellant alleges (1) that the tender offer did not disclose the true market value of certain WesPac real estate holdings not used for railroad operations, and (2) that WesPac's decision to forgo dividends for the last three quarters of 1979 was intended to depress the value of the WesPac stock.

The district court dismissed the action for lack of subject matter jurisdiction,[2] holding that § 11341(a) of the Interstate Commerce Act exempted the transaction from attack under all other laws, including the federal

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[1] In 1983 appellant commenced a similar action in the Southern District of New York, alleging fraud in connection with the tender offer. This action was dismissed without prejudice for failure to plead fraud with particularity. *Deutsch v. Flannery*, 597 F.Supp. 917 (S.D.N.Y. 1984).

[2] The district court had previously dismissed the action on the ground of issue preclusion. Our court reversed in part and remanded. *Deutsch v. Flannery*, 823 F.2d 1361 (9th Cir. 1987).

securities laws, once it had been approved by the ICC.[3] We have jurisdiction under 28 U.S.C. § 1291 (1982), and we affirm.

[1] We agree with the district court that this case is controlled by *Schwabacher v. United States*, 334 U.S. 182 (1948). The plaintiffs in *Schwabacher* were a group of former shareholders of the Pere Marquette Railway Company who were dissatisfied with an ICC-approved railroad merger plan between Pere Marquette and the Chesapeake & Ohio Railway Company. Relying upon a provision in the Pere Marquette charter, plaintiffs claimed that under Michigan law they were entitled to more per share than the amount the ICC had determined to be just and reasonable. The Supreme Court held that the Michigan law claims could not be maintained if their resolution might lead to a share price that exceeded that which the ICC had found to be just and reasonable. We see no

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[3] 49 U.S.C. § 11341(a)(1982) provides in relevant part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and all other law, including state and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

principled basis for distinguishing *Schwabacher* from this case.[4] Both this case and *Schwabacher* involve attempts by former shareholders to obtain higher prices for their shares than the prices approved as fair and reasonable by the ICC.

[2] Appellant's attempt to distinguish *Schwabacher* is to no avail. Appellant argues that *Schwabacher* was a Supremacy Clause case – that the plaintiffs' claims in *Schwabacher* were rejected only because they were based upon state law, which was trumped by the federal Interstate Commerce Act. We find this reading of *Schwabacher* untenable. Nowhere does the *Schwabacher* Court suggest that its analysis would have been different had the plaintiffs' claims been based upon federal law. Moreover, the statutory provision upon which the *Schwabacher* Court relied drew no distinction between state and federal law for the purposes of exemption. To the contrary, the statute

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[4] It is true that the Court in *Schwabacher* was interpreting 49 § 11341(a)'s predecessor rather than § 11341(a) itself. The two sections are nearly identical, however. Section 11341(a)'s predecessor provided that participants in an ICC approved transaction were immune from "all other restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to carry into effect the transaction . . . and to hold, maintain and operate any properties and exercise any control or franchises acquired through such transactions." Interstate Commerce Act, ch. 722, Title 1, § 7, 54 Stat. 905 (1940) (current version at 49 U.S.C. § 11341(a)). Because the language of § 11341(a), *see supra* n.3, is not materially different from that of its predecessor, the *Schwabacher* Court's recognition of the broad preemptive sweep of ICC approval directly undercuts appellant's contention that § 11341(a) does not bar his claims based upon the federal securities laws.

explicitly provided that parties to an ICC-approved transaction were relieved of "restraints, limitations and prohibitions of law, *Federal, State, or municipal*. . . ." Interstate Commerce Act, ch. 722, Title 1, § 7, 54 Stat. 905 (1940) (current version at 49 U.S.C. § 11341(a)).

Appellant's reliance upon *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), is misplaced. In *City of Palestine*, the plaintiff municipality sued to enforce a contract it had made with MoPac, a railroad carrier, in 1954. MoPac claimed that it no longer had any obligations to the City because the ICC had abrogated the contract while approving a merger between MoPac and two of its subsidiaries in 1976. The Fifth Circuit rejected this argument, holding that Congress did not intend to give the ICC the power to relieve MoPac of preexisting contractual obligations that were unrelated to the merger transaction under ICC review. This holding clearly has no application to the instant case. Appellant here does not seek to enforce any preexisting contracts with Union Pacific or WesPac that are unrelated to the Union Pacific-WesPac merger. Rather, he is directly challenging the terms of the merger transaction itself – a transaction which the ICC undeniably had the power to review and approve. *See* 49 U.S.C. § 11343(a)(3).

Appellant also relies upon *Plaine v. McCabe*, 797 F.2d 713 (9th Cir. 1986), a case which is clearly inapposite. In *Plaine*, we held that a California Corporations Commissioner's finding that a merger price was fair did not foreclose a shareholder from bringing suit claiming that misstatements in the tender offer violated federal securities laws. Since the merger transaction in *Plaine* was not

subject to ICC review and approval, we had no occasion to consider or discuss the preemptive scope of ICC approval under 49 U.S.C. § 11341(a).

[3] Appellant also argues that § 11341(a) does not apply to this case because the ICC had no jurisdiction to review the fairness of Union Pacific's tender offer as it was not part of the merger transaction. We disagree. The tender offer was the first step in the transaction by which Union Pacific acquired control of WesPac; it was an integral part of the Agreement of Merger, not a discrete, unrelated transaction. Thus while it may be true, as appellant asserts, that the ICC does not have authority to review *all* tender offers made by rail carriers, the ICC clearly had the authority to review Union Pacific's tender offer because it was part of a transaction by which one carrier acquired control of another. 49 U.S.C. § 11343(a)(3).

Finally, the fact that the Union Pacific-WesPac merger was effected through the device of a voting trust does not deprive the ICC of jurisdiction over the transaction. The voting trust mechanism allows carriers to effectively complete a merger transaction while they are awaiting ICC approval, but it does not obviate the need for ICC approval. *See Water Transport Ass'n v. I.C.C.*, 715 F.2d 581, 582, (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984).

For the foregoing reasons, the district court's dismissal of appellant's action for lack of subject matter jurisdiction is

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAMUEL DEUTSCH, Plaintiff, -vs- ROBERT G. FLANNERY, et al., Defendants.	)	No. C 84-79928 ORDER RE: DEFENDANTS' MOTION TO DISMISS

(Filed April 8, 1988)

Plaintiff brings this stockholder's class action against defendants asserting claims under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, as well as under common law. Plaintiff is challenging the adequacy and the truthfulness of disclosures made in connection with defendant Union Pacific Corporation's ("Union Pacific") tender offer for the common stock of the defendant Western Pacific Railroad Company ("WESPAC").

The tender offer at issue was made on January 23, 1980. Plaintiff alleges that the tender offer to stockholders misrepresented and/or failed to disclose the true value of certain WESPAC real estate holdings as well as defendants' plan to transfer that real estate to Union Pacific at undervalued prices. Plaintiff alleges that defendant WESPAC failed to declare dividends in order to depress the market price of its stock. Plaintiff further alleges that defendant Robert Flannery ("Flannery"), then WESPAC's president and controlling stockholder, assisted in Union Pacific's efforts to acquire WESPAC in exchange for a management position at Union Pacific.

On September 24, 1982, the Interstate Commerce Commission ("ICC") approved the Union Pacific-WESPAC merger. On May 9, 1983, Daniel Bruno, a stockholder in WESPAC, petitioned the ICC to reopen its proceeding and reconsider the fairness of the merger. The ICC denied the petition. The merger was completed and was approved at a special meeting of WESPAC stockholders on May 24, 1983.

Another WESPAC stockholder, Edward K. Wheeler, appealed the ICC's decision to the Court of Appeals for the District of Columbia Circuit. The Court of Appeals upheld the ICC's decision with respect to the issues involved in this litigation. *Southern Pacific Trans. Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984). The United States Supreme Court subsequently denied Wheeler's petition for certiorari. 469 U.S. 1208 (1985).

On July 14, 1983, plaintiff commenced an action before the United States District Court for the Southern District of New York ("New York action"). On October 3, 1984, the action was dismissed without prejudice for failure to plead fraud with particularity. *Deutsch v. Flannery*, 597 F. Supp. 917 (S.D.N.Y. 1984). On October 30, 1984, plaintiff filed a Notice of Appeal in the New York action. The appeal in the New York action was withdrawn by mutual consent of the parties.

Plaintiff filed the instant action on December 14, 1984. On May 1, 1985, this court granted defendants' motion to dismiss on the ground of issue preclusion. On appeal from that order, the Ninth Circuit affirmed in part, reversed in part, and remanded the matter to this court.

The matter is currently before the court on defendants' motion to dismiss.

Defendants move for the dismissal of this action arguing that (1) this court lacks jurisdiction over the action; and (2) plaintiff's claims are barred by the applicable statute of limitations. Plaintiff opposes defendants' motion.

The Ninth Circuit has reviewed the standard for a motion to dismiss.

> . . . a complaint should not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).
>
> A complaint may be dismissed as a matter of law for two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable theory. 2A J. Moore, *Moore's Federal Practice* ¶ 12.08 at 2271 (2d ed. 1982).

Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984).

Defendants argue that this court is without jurisdiction to adjudicate plaintiff's claim that the price per share in the tender offer was unfair to WESPAC stockholders. Defendants argue that the ICC has already determined that the price was fair and reasonable and that this determination was upheld by the Court of Appeals for the D.C. Circuit. Defendants maintain the present action is an impermissible collateral attack on that determination.

Plaintiff contends that he is not precluded from litigating the fairness of the tender offer's price per share.

Plaintiff argues that the ICC only passed on the fairness of defendants' proposal to freeze out minority stockholders, not the fairness or legality of Union Pacific's prior purchases of WESPAC shares. Plaintiff also argues that the ICC did not have jurisdiction to consider the tender offer or appurtenant issues.

Through the Interstate Commerce Act and its amendments, Congress has granted to the ICC authority to regulate various activities of interstate rail carriers, including their decisions to consolidate. Subchapter III of Chapter 113 of the Interstate Commerce Act provides, in relevant part:

> (a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may be carried out only with the approval and authorization of the Commission:
>
> (1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.
>
> * * *
>
> (3) acquisition of control of a carrier by any number of carriers.
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> * * *
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> (5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.
>
> * * *
>
> (b) A person may carry out a transaction referred to in subsection (a) of this section or

> participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter.

49 U.S.C. § 11343.

The Interstate Commerce Act makes the jurisdiction of the ICC "plenary and exclusive and independent of all other state or federal authority." *Schwabacher v. U.S.*, 334 U.S. 182, 197 (1948). The Act provides, in relevant part:

> (a) *The authority of the Interstate Commerce Commission under this subchapter is exclusive.* A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. *A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law,* including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote.

49 U.S.C. § 11341(a) (emphasis added).

Under the explicit terms of the Interstate Commerce Act, defendants were required to get ICC approval for the proposed merger. The ICC considered the merits of the Union-Pacific and WESPAC consolidation at issue in this lawsuit, and concluded that the terms of the transaction were "just and reasonable." 366 I.C.C. 459, 636. The ICC stated that the $20 per share offer fell "within a reasonable range of values for [WESPAC] stock to be acquired by [Union Pacific]." *Id.* The ICC further concluded that "the price to be paid for [WESPAC] stock under the merger agreement is fair and reasonable." *Id.* at 638. The court finds that the ICC did consider the fairness of the tender offer price, and that the ICC found that price to be fair and reasonable.

Plaintiff's contention that the tender offer's price was unfair to stockholders conflicts with the ICC's determination that the price was fair and reasonable. Plaintiff's claim under the federal securities laws and common law that he is entitled to more than the $20 per share he has already received is in essence a collateral attack on the ICC order. Congress has granted the ICC exclusive statutory jurisdiction over issues arising from one railroad's acquisition of another. Judicial review of ICC orders is limited to an action brought pursuant to 28 U.S.C. §§ 2321 and 2342, and is exclusively within the jurisdiction of the courts of appeals. The district courts have no jurisdiction over such actions. *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 799 (1st Cir.), *cert. denied*, 107 S.Ct. 111 (1986). The court therefore finds it is without jurisdiction to consider plaintiff's claim.

Having determined that it is without jurisdiction in this matter, the court cannot consider and merits of defendants' contention that plaintiff's action is barred by the statute of limitations.

In accordance with the foregoing, the court orders that defendants' motion to dismiss for lack of jurisdiction is granted.

Dated: April 8, 1988

/s/ Samuel Conti
United States District Court

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAMUEL DEUTSCH, *Plaintiff-Appellant,* v. ROBERT G. FLANNERY, ROBERT C. MARQUIS, RICHARD W. STUMBO, JR., WALTER J. TREANOR, JOHN G. BANNISTER, WAYNE T. DONNELS, JOHN G. McDONALD, JUSTIN M. ROACH JR., JOSEPH ROSENBLATT, WESTERN PACIFIC RAILROAD COMPANY and UNION PACIFIC CORPORATION, *Defendants-Appellees.*	No. 85-1953 D.C. No. C-84-7928-SC OPINION

Argued and Submitted
July 18, 1986 – San Francisco, California

Filed July 31, 1987

Before: Richard H. Chambers, Betty B. Fletcher and Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Nelson

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

SUMMARY

Courts and Procedure

Appeal from grant of motion to dismiss. Affirmed in part, reversed in part, and remanded.

This action arises from appellee Union Pacific Corporation's offer to purchase Western Pacific Railroad Company (WesPac) stock. Appellant Deutsch first filed a complaint alleging violations, inter alia, of the Securities Exchange Act of 1934 in the Southern District of New York, claiming that Union Pacific's tender offer document failed to disclose material information. That court dismissed the action without prejudice, concluding that the complaint failed to plead fraud with sufficient particularity. Subsequently, Deutsch filed this complaint in the Northern District of California alleging the same claims against the same parties, and making only a few substantive changes in the complaint. The court held that dismissal was mandated by the doctrine of issue preclusion.

[1] While Deutsch's claim that defendants failed to disclose a plan to install Flannery in a management position with Union Pacific was precisely the same statement as in the previous complaint, the complaint's statements of the land valuation claim and stock dividen [sic] claim are different enough to render the doctrine of issue preclusion inapplicable. [2] These circumstances constituting the alleged fraud have been stated with sufficient specificity to advise the defendants of the misconduct with which they are charged.

COUNSEL

Richard M. Meyer, New York, New York, for the plaintiff-appellant.

Kurt W. Melchior, San Francisco, California, Leonard Joseph, New York, New York, for defendant-appellee.

OPINION

NELSON, Circuit Judge:

Samuel Deutsch appeals from an order of the district court granting defendants' motion to dismiss his action on behalf of persons who sold their shares of Western Pacific Railroad Company ("WesPac") in response to a 1980 tender offer by Union Pacific Corporation ("Union Pacific"). Having determined that the complaint before him was "substantially identical" to a complaint previously filed by Deutsch in another court and dismissed there without prejudice pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, the trial judge held that a dismissal in this case was mandated by the doctrine of issue preclusion. We affirm the dismissal in part, reverse in part, and remand for further proceedings.

FACTUAL BACKGROUND

I. *Dismissal of the Previous Action*

On July 14, 1983, Deutsch filed an action in the Southern District of New York against Union Pacific, WesPac, and the directors of WesPac, alleging violations of sections 10(b) and 14(e) of the Securities Exchange Act of 1934, as well as breach of fiduciary duty under the

common law, all in connection with Union Pacific's offer to purchase WesPac stock for $20 per share. His complaint focused upon a document, issued by Union Pacific and received by all WesPac shareholders, that solicited acceptance of the offer, included a description and valuation of WesPac's assets, estimated WesPac's book value to be $12.79 per share, and contained a unanimous recommendation by the WesPac board that the shareholders accept the offer because the directors regarded the price as fair. Deutsch claimed that the tender offer document failed to disclose the following material information: (i) that the fair market value of WesPac's real estate assets far exceeded the stock's reported book value of $12.79 per share; (ii) that WesPac's failure to pay dividends was due to a scheme by the defendants to depress the market price of the stock; and (iii) that the defendants had planned for Robert Flannery, then WesPac's president, chief executive officer, and dominant shareholder, to acquire a management position with Union Pacific in exchange for his having aided and abetted the fraudulent tender offer.

On September 27, 1984, Judge John F. Keenan issued an order dismissing the action, without prejudice, pursuant to the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. *See Deutsch v. Flannery,* 597 F.Supp. 917 (S.D.N.Y. 1984). He concluded that the complaint failed to plead fraud with sufficient particularity because it "d[id] not allege facts indicating an intent to deceive, manipulate or defraud or from which such intent may be reasonably inferred." *Id.* at 922.

In addressing Deutsch's primary contention – that the tender offer document failed to disclose the wide

discrepancy between the historical cost and the fair market value of WesPac's real estate assets – Judge Keenan first noted the complaint's reliance upon a 1983 proxy statement. Whatever discrepancy the statement might have revealed, Judge Keenan wrote, "there [wa]s no basis for concluding that the size of the land holdings ha[d] not changed or that the value of the land ha[d] not increased since 1980 [the year of the tender offer]." *Id.* at 921. He also pointed to the complaint's lack of factual support for the contention that "defendants were aware of or recklessly disregarded the value of the land." *Id.*[1] Finally, he concluded that there could not have been any fraud in this regard because "the existence of the land and its value . . . had already been disclosed." *Id.* "A claim of fraud," Judge Keenan explained, "cannot be based on the defendant's failure to report the future market value of the land because they were under no obligation to report that value. The federal securities laws do not require disclosure of predictions regarding future values." *Id.* (citations omitted).

Deutsch's other two contentions were dismissed more summarily. About WesPac's failure to pay dividends, Judge Keenan responded that WesPac may not have been capable of paying a dividend, and that "[t]he mere fact that a company passe[s] dividends is not

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[1] Judge Keenan was struck by the fact that WesPac directors sold their stock in 1980 for the same $20 per share received by Deutsch and his fellow shareholders. That the directors were willing to part with their stock for $20 per share suggests they did not think the price inadequately low. *See Deutsch v. Flannery*, 597 F.Supp. at 922.

enough to support an inference that it d[oes] so fraudulently." *Id.* On the subject of defendants' plan to install Flannery in a management position with Union Pacific, Judge Keenan decried the lack of factual support for the allegation, and observed that Flannery did not assume the presidency of a Union Pacific subsidiary until 1982 (two years after the tender offer), following the death of the previous president. *Id.*

II. *The Present Complaint*

Deutsch failed to take an appeal, *see post*, note 2, and on December 12, 1984, he filed a new complaint – this time in the Northern District of California – alleging the same federal and state law claims against the same defendants. In response to the previous dismissal, Deutsch made only a few substantive changes in the complaint. First, he alleged that "[d]uring 1980 alone, WesPac sold land carried on its books at $270,000 for $9,397,000, negotiations for which took place, in part, during the pendency of the tender offer." Second, he added an allegation that WesPac directors were afforded the opportunity to sell options that they otherwise could not have exercised, in return for having recommended acceptance of the tender offer and having surrendered their shares of stock for $20 each. Third, he alleged that WesPac was "well able" to pay a dividend prior to the Union Pacific tender offer. And last, he added an allegation that Flannery had sold his stock to Union Pacific for $23.20 per share rather than $20 per share, as stated in the tender offer document.

The defendants moved for dismissal, arguing that Deutsch had made only cosmetic changes in his earlier

complaint, and that the issue of whether the complaint pleaded fraud with sufficient particularity had already been decided by Judge Keenan in the earlier action. Deutsch responded that the several changes he had made in the complaint rendered unnecessary a redetermination of the Rule 9(b) sufficiency of his original complaint. Accordingly, the court would not have to decide an issue of fact or law "actually litigated and necessarily decided by a valid and final judgment in a prior action between the parties." *Segal v. AT&T*, 606 F.2d 842, 845 (9th Cir. 1979). The district court rejected that argument. On appeal, we agree that the Rule 9(b) sufficiency of Deutsch's final claim – alleging defendants' failure to disclose a plan to install Flannery in a management position with Union Pacific – has already been decided. As to Deutsch's "land valuation" and "stock dividend" claims, we hold that the doctrine of issue preclusion does not control, and that the present complaint's statements of those claims come within the required particularity of Rule 9(b).

DISCUSSION

I. *Issue Preclusion*

The litigation of an issue presented and necessarily decided in a prior action between the same parties is foreclosed by the doctrine of issue preclusion. *See Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Segal*, 606 F.2d at 844-45. It matters not that the prior action resulted in a dismissal without prejudice, so long as the determination being accorded preclusive effect was essential to the dismissal. *See In re Duncan*, 713 F.2d 538, 541 (9th Cir. 1983); *see also* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and*

Procedure, § 4418 at 171 (1981) ("The most common applications of direct estoppel arise from dismissal of a first action on grounds that do not go to the merits of the claim presented and that are not intended to preclude a second action.") Here, defendants argue that, by virtue of Judge Keenan's dismissal of the previous complaint under Rule 9(b), Deutsch is foreclosed from litigating the issue of whether his present complaint satisfies the requirements of that rule. They contend that the complaints are nearly identical, and that the sufficiency of such a complaint has already been determined by Judge Keenan. Deutsch takes issue with defendants' characterization of his present complaint. He argues that its additional allegations make it sufficiently different from his previous complaint so as to render inapplicable the doctrine of issue preclusion. We evaluate each of Deutsch's claims separately, and review *de novo* the district court's decision in favor of defendants on this mixed question of fact and law. *See A&A Concrete v. White Mountain Apache Tribe*, 781 F.2d 1411, 1414 (9th Cir. 1986).

[1] To the extent that there are no differences in the two complaints, or that the differences obviously lack substantive significance, we agree with the district court. Accordingly, we affirm the dismissal of Deutsch's claim that defendants failed to disclose an alleged plan to install Flannery in a management position with Union Pacific. The present complaint makes precisely the same statement of this claim as the previous complaint.[2]

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[2] Deutsch argues that a letter from defendants' counsel confirms an agreement by defendants to waive the defense of

(Continued on following page)

Insofar as Deutsch's additional allegations are colorably responsive to the deficiencies noted by Judge Keenan, however, we must agree with Deutsch. Thus, we disagree with the district court's assessment of the "land valuation" and "stock dividend" claims. With regard to the former, Deutsch has added the allegations about the sale of land in 1980 and the negotiations for the sale of the land during the pendency of the tender offer. As to the latter, he has asserted WesPac's ability to pay a dividend. The present complaint's statement of each claim is different enough to render the doctrine of issue preclusion inapplicable. *Cf. Harris v. Jacobs*, 621 F.2d 341 (9th Cir.

(Continued from previous page)

issue preclusion upon his withdrawal of the appeal from Judge Keenan's dismissal of the previous complaint. Issue preclusion is an affirmative defense that may be waived if not pleaded. *See Santos v. Alaska Bar Ass'n*, 618 F.2d 575, 576-77 (9th Cir. 1980); *see also* C. Wright, A. Miller & E. Cooper, 18 *Federal Practice and Procedure*, § 4405, at 32 (1981) ("a party entitled to demand preclusion is also entitled to waive it"). We conclude that there was no waiver here. The letter from defendants' counsel stated that defendants would "not oppose Deutsch's right to file a new complaint arising out of the matters involved in the case," but also reserved their "right to file any and all motions addressed to [such] a . . . complaint." The letter makes no mention of issue preclusion. Further, we think it improbable that the defendants would waive issue preclusion in exchange for Deutsch's withdrawal of his Second Circuit appeal, given that such an agreement would allow Deutsch to file the same exact complaint in district court and *then* proceed to take an appeal if the district court dismissed the complaint on Rule 9(b) grounds. We think it more likely that defendants' counsel was simply confirming the uncontroversial legal proposition that Deutsch had the right to file a new action because the prior action had been dismissed without prejudice.

1980) (any doubt about whether issue was actually adjudicated in prior proceeding is resolved against party attempting to apply doctrine of issue preclusion). This is not to say that Deutsch has stated the claims with the requisite particularity. Because we may affirm on any basis appearing in the record, *see Oldfield v. Athletic Congress*, 779 F.2d 505, 506 (9th Cir. 1985), we proceed to determine whether the present complaint's statement of those claims does satisfy the particularity requirement of Rule 9(b).

II. *Rule 9(b)*

Rule 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R. Civ. P. 9(b). In this circuit, a pleading satisfies the particularity requirement "if it identifies 'the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations.' " *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866, 866 (9th Cir. 1977) (quoting *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973)); *see also Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) ("Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.").

[2] Here, the circumstances constituting the alleged fraud have been stated with sufficient specificity to advise the defendants of the misconduct with which they are charged. About the defendants' asserted failure to

reveal the discrepancy between historical cost and fair market value of WesPac's landholdings, Deutsch has alleged that "[d]uring 1980 alone [(i.e., the year of the tender offer)], WesPac sold land carried on its books at $270,000 for $9,397,000." Accordingly, Judge Keenan's criticism of the previous complaint for its reliance upon 1983 land values is inapposite here. Further, Deutsch has alleged that the negotiations for those land sales "took place, in part, during the pendency of the tender offer." In so doing, he has cured the other two deficiencies noted by Judge Keenan. First, he has provided support for his allegation that defendants knew of the discrepancy.[3] Second, he has extended his allegation of fraud beyond the non-disclosure of mere predictions regarding future values. During the negotiations for the land, the defendants may have received firm offers to purchase. To the extent that there were any such offers, defendants may have had an obligation to make those "valuations" known to WesPac shareholders. While the federal securities laws may not require the disclosure of predicted future values or even estimated current values, they may require a corporation's disclosure of definite offers to purchase. *See South Coast Services Corp. v. Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1270-73 (9th Cir. 1982). Requiring the

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[3] Insofar as the directors' sale of stock for $20 per share would appear to foreclose a finding of scienter on their part, *see ante*, note 1, Deutsch's added allegation – that the directors were afforded an opportunity to sell options they otherwise could, not have exercised, in return for their surrender of WesPac stock for $20 per share – puts forward a plausible scenario consistent with a finding of scienter.

disclosure of such offers does not interfere with the goal of protecting "shareholders who might place indiscriminate trust in estimates of questionable reliability." *Id.* at 1275 (Fletcher, J., dissenting).[4]

About the defendants' asserted failure to reveal the alleged scheme to depress WesPac's market price by failing to pay dividends, Deutsch's present complaint is also sufficiently detailed. The defendants have enough information to frame a responsive pleading. *See Bosse v. Crowell Collier and MacMillan*, 565 F.2d 602, 611 (9th Cir. 1977). "Rule 9(b) does not . . . require plaintiffs in a securities fraud case to set forth facts which, because no discovery has yet occurred, are in the exclusive possession of the defendants." *Merrit v. Libby, McNeil & Libby*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶97,848, at 90,238 (S.D.N.Y. 1981) (concluding that allegation of conspiracy to eliminate shareholders' dividend rights need not detail acts performed in furtherance of conspiracy in order to meet requirements of Rule 9(b)). Inasmuch as Deutsch's previous complaint was deficient because of its failure to allege WesPac's financial ability to pay a

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[4] It remains to be seen whether Deutsch can show that WesPac did receive a firm offer (with its attendant valuation) and that such information was material to the decisions of shareholders who tendered their stock. *Cf. TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (defining materiality); *Toombs v. Leone*, 777 F.2d 465, 469 (9th Cir. 1985) (materiality involves " 'assessments peculiarly within the province of the trier of fact' ") (quoting *Arrington v. Merrill Lynch, & Pierce, Fenner & Smith*, 651 F.2d 615, 619 (9th Cir. 1981)).

dividend, the present complaint has corrected that deficiency.[5]

Thus, Deutsch has pleaded his "land valuation" and "stock dividend" claims with sufficient particularity under Rule 9(b). The defendants have received precise statements of what they allegedly failed to disclose. Of course, Deutsch has not yet proven that defendants violated the federal securities laws or breached their common law duties. We emphasize that "[t]he pleading rules, designed to avoid and reduce long and technical allegations, are necessarily supplemented by procedures involving summary judgment which enable a party to have a judgment in a relatively short time if there is actually no bona fide claim presented." *Walling*, 476 F.2d at 397.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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[5] While, as the district court noted, WesPac may have had no legal obligation to pay a dividend which it was capable of paying, *see Marsh v. Armanda Corp.*, 533 F.2d 978, 986, (6th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977), the company did have an obligation to make material disclosures. Thus, Deutsch states a proper claim by alleging that the defendants failed to disclose their scheme to depress the market price of WesPac by the nonpayment of dividends. *See Merrit*, [1981 Transfer Binder] at 90,236. On remand, Deutsch must prove the existence of such a scheme and the materiality of information relating to the scheme.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAMUEL DEUTSCH, Plaintiff, -vs- ROBERT G. FLANNERY, et al., Defendants.	NO. C-84-7928 SC AMENDED ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FILED MAY 1 1985

Plaintiff brings this action on behalf of all persons who sold their shares of defendant Western Pacific Railroad Corporation ("WesPac") stock in response to a 1980 tender offer by defendant Union Pacific Corporation ("Union Pacific"). Plaintiff filed suit against defendants in the Southern District of New York in July, 1983, alleging violation of §§10(b) and 14(e) of the Securities Exchange Act of 1934 ("SEA"), and breach of fiduciary duty. On October 31, 1984, United States District Judge John F. Keenan dismissed plaintiff's case without prejudice pursuant to Rule 9(b) of the Fed. R. of Civ. Pro. On December 12, 1984, plaintiffs filed a second complaint against defendants in the Northern District of California, alleging the same federal and state claims.

The matter is presently before the court on defendants' motions to transfer this action to the Southern District of New York or, in the alternative, to dismiss the complaint.

Defendant WesPac is a rail carrier, primarily operating in Northern California, Nevada, and Utah. WesPac also owns substantial amounts of real property not associated with its carrier business. In 1979, WesPac became a public company, issuing 1,400,000 shares of class A common stock which it sold to the public at $10 per share. The company also issued 10,000 shares of class B stock, holders of which were entitled to elect a majority of the WesPac board of directors. Defendant Flannery purchased a majority of the class B stock, thereby obtaining control of the company.

On or about January 20, 1980, defendant Union Pacific offered to purchase any and all shares of WesPac for $20 per share. Union Pacific sent all WesPac shareholders a tender offer document that described WesPac's business assets; the document also referred shareholders to WesPac's Registration Prospectus and other public filings for more detailed financial information about the target company. The tender offer document contained a unanimous recommendation by the WesPac board of directors that its shareholders accept Union Pacific's offer. Union Pacific thereafter acquired a controlling interest in WesPac.

In May, 1983, WesPac issued a proxy statement disclosing that certain of WesPac's landholdings had been sold for an amount far in excess of book value. Plaintiff thereafter filed suit against WesPac, Union Pacific, Flannery, and WesPac's former directors, claiming that the 1980 tender offer was false and misleading. Specifically, plaintiff alleges the existence of a 1980 scheme among defendants to allow Union Pacific to acquire WesPac for a price far below its actual worth. Plaintiff argues that the

tender offer document did not fairly inform shareholders of the value of WesPac's real estate assets. Plaintiff further claims that the directors of WesPac refused to declare dividends prior to the tender offer because they wanted to depress the market price of WesPac stock and thereby facilitate the Union Pacific takeover. Plaintiff finally alleges that, in exchange for helping Union Pacific acquire WesPac, defendant Flannery was appointed to an executive position at a Union Pacific subsidiary two years after the tender offer.

Defendants claim that plaintiff is precluded from filing the instant complaint by virtue of Judge Keenan's prior dismissal under Rule 9(b). To state a claim under §§10(b) and 14(e) of the SEA, plaintiff must allege acts indicating an intent to deceive, manipulate, or defraud. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 192 n. 7 (1976). Rule 9(b) provides, "In all averments of fraud or mistake, the dismissal 9(b). Briefly, to state a claim under §§10(b) and 14(e) of the SEA, plaintiff must allege acts indicating an intent to deceive, manipulate, or defraud. [sic] *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 192 n. 7 (1976). Rule 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Judge Keenan found that,

> "[the original] complaint did not allege facts indicating an intent to deceive, manipulate or defraud or from which such intent may be reasonably inferred,,, [sic] [Thus] it does not comply with the particularity requirements of Rule 9(b)."

Deutsch v. Flannery, [1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,685, at 99, 470 (S.D.N.Y. 1984). Defendants argue that because the complaint before this court is "virtually identical" to that previously filed in the Southern District of New York, and because Judge Keenan found the earlier complaint inadequate under Rule 9(b), principles of res judicata require this court to dismiss the instant complaint.

The doctrine of issue preclusion forecloses relitigation of those issues of fact or law that were "actually litigated and necessarily decided by a valid and final judgment in a proir [sic] action between the parties." *See Segal v. American Telephone and Telegraph Company,* 606 F.2d 842, 845 (9th Cir. 1979). The doctrine applies even when the earlier judgment addressed procedural, rather than substantive, concern. 18 C. Wright, A. Miller and E. Cooper, Federal Practice and Procedure: Jurisdiction §4418, at 171 (1981). Moreover, estoppel operates where the prior judgment resulted in a dismissal without prejudice, provided that judgment was "sufficiently firm" with respect to the issues actually decided. *See In re Duncan,* 713 F.2d 538, 544 (9th Cir. 1983). Upon review of the record, the court determines that dismissal of plaintiff's action on grounds of issue preclusion is indeed warranted.

As defendant notes, "[a] word-by-word comparison of the present complaint with the complaint dismissed by Judge Keenan reveals that plaintiff has made only [six minor] . . . changes" in his new pleading. Defendants' Memorandum of Points and Authorities in Suport [sic] of Motion to Transer [sic], p. 7. Plaintiff nonetheless claims that "the instant allegations and submissions differ greatly from the first action." Plaintiff's Memorandum of

Points and Authorities in Opposition to Motion to Transfer, p. 19. As such, plaintiff argues, this court is not faced with the necessity of redetermining the Rule 9(b) sufficiency of plaintiff's original complaint.

In support of his argument, plaintiff argues that unlike the instant complaint, "[t]he old complaint did not allege defendants were engaged in negotiations for the sale of WesPac land at prices greatly above book value *during the pendency of the tender offer.*" Plaintiff's Memorandum, p. 19 (emphasis added); Complaint ¶21. Plaintiff claims this new allegation both cures Judge Keenan's finding that the old complaint was "devoid of facts indicating the market value of the land was substantially greater than its historical cost in 1980," and indicates that defendants knowingly misrepresented this fact in order to maintain a low tender price. *See Deutsch,* at 99,469. True, the fact that defendants participated in such negotiations might suggest that, at the time of the tender offer, WesPac's books largely understated the value of its real property assets. As Judge Keenan found, however, WesPac had disclosed sales of real estate for amounts in excess of historical cost prior to the tender offer in question. Regardless of defendant's knowledge that WesPac holdings were extremely valuable, then,

> "A claim of fraud . . . [still] cannot be based on failure to disclose the existence of the land and its value because that information had already been disclosed."

Deutsch, at 99,470.

Plaintiff's revised complaint also newly alleges that defendants Stumbo, Marquis and Treanor agreed to sell their own stock for $20 per share "in return" for WesPac's

purchase of nonexercisable options from certain of its employees and officers. Complaint, ¶18. Plaintiff claims that this ¶18 revision establishes an inference of scienter on the part of the director defendants, and thus cures Judge Keenan's finding that the original complaint was "devoid of facts suggesting that defendants were remiss in valuing the stock" for tender purposes. *Deutsch,* at 99,469. As Judge Keenan noted, however, scienter cannot be inferred from allegations based on information and belief alone. This court now finds that plaintiff's amendment to ¶18 does not render the charge of fraudulent purpose any less conclusory than did the original complaint. *See McFarland v. Memorex Corp.*, 493 F. Supp. 631, 637 (N.D. Cal. 1980).

Plaintiff argues that unlike his revised complaint, "the initial complaint did not allege that WesPac was financially able to pay dividends . . . " prior to Union Pacific's tender offer. Plaintiff's Memorandum, p. 20. Plaintiff claims that WesPac's refusal to declare such dividends suggests "a manipulative device to place a celing [sic] on the trading value of the company shares." *Id.* As Judge Keenan has already noted, however, "[t]he mere fact that a company passed dividends is not enough to support an inference that it did so fraudulently." *Deutsch,* at 99, 470.

Finally, plaintiff notes that his revised complaint newly underscores defendant Flannery's participation in the alleged scheme to undervalue WesPac stock. The new complaint alleges that the tender offer document was false and misleading in stating that Flannery agreed to sell his stock at $20 per share when, in fact, he sold it at $23.20 per share. Complaint, ¶21(e). The court finds that the $3.20 price differential involved does not sufficiently

indicate either that WesPac stock was worth "more than $100.00 per share" at the time of the tender offer, or that Flannery was aware of that fact. Complaint, ¶21.

Plaintiff claims that even if the court finds that the instant complaint is virtually identical to the original complaint, defendants have waived their right to argue for dismissal on grounds of issue preclusion. Plaintiff claims that he abandoned Second Circuit appeal of Judge Keenan's dismissal because defendants stated that "they would not object to [plaintiff's] filing of a new action." Plaintiff's Memorandum, p. 17. Plaintiff argues that he would never have withdrawn his appeal absent this statement, and that defendants should not now be heard to challenge the sufficiency of the instant complaint.

The court finds plaintiff's argument to be meritless. Plaintiff claims that the parties' alleged agreement was "embodied in writing, [and] signed by Mr. Joseph [, defendants' attorney,] on behalf of all defendants." The letter from Mr. Joseph provides,

> "Since the dismissal [of the original complaint] was without prejudice . . . , we do not oppose your right to file a new action. All of the foregoing is, of course, without prejudice to our right to file any and all motions addressed to a new complaint."

Affidavit of Richard M. Meyer, Exhibit A. The court finds that the writing in question does not constitute a waiver of defendants' right to challenge the sufficiency of any new complaint might file. Rather, defendants' letter merely acknowledges that a dismissal without prejudice allows plaintiff to refile a new complaint which comports with the requirements of Rule 9(b).

Accordingly, the court finds that the instant complaint is substantially identical to the complaint previously dismissed in the Southern District of New York. Although plaintiff has made certain changes in his new complaint, these changes are primarily cosmetic in nature. Because the court determines that plaintiff's case should be dismissed on grounds of issue preclusion, it does not address defendants' motion to transfer this case to the Southern District of New York pursuant to 28 U.S.C. §1404(a). Moreover, the court does not reconsider whether the fraud allegations in the original or revised complaints comply with Rule 9(b) requirements.

In accordance with the foregoing, the court hereby orders that:

(1) defendants' motion to dismiss plaintiff's action without prejudice is granted.

Dated: May 1, 1985.

/s/ Samuel Conti
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL DEUTSCH, Plaintiff-Appellant, v. ROBERT G. FLANNERY, ROBERT C. MARQUIS; RICHARD W. STUMBO, JR., WALTER G. TREANOR; JOHN G. BANNISTER; WAYNE T. DONNELS, JOHN G. McDONALD; JUSTIN M. ROACH, JR.; JOSEPH ROSENBLATT; THE WESTERN PACIFIC RAILROAD COMPANY; UNION PACIFIC CORP., Defendants-Appellees.	No. 88-2629 ORDER FILED MAR 9 1990

Before: NORRIS, BEEZER, and BRUNETTI, Circuit Judges

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

SECTION 10 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. SECTION 78j (1981)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SECTION 14(e) OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. SECTION 78n(e) (1981)

§ 78n. Proxies

* * *

Untrue statement of material fact or omission of fact with respect to tender offer

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any

material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

SECTION 27 OF THE SECURITIES EXCHANGE ACT OF 1934, 15 U.S.C. SECTION 78aa (1988)

§ 78aa. Jurisdiction of offenses and suits

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is

found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

SECURITIES AND EXCHANGES COMMISSION RULE 10b-5, 17 C.F.R. SECTION 240.10b-5

Reg. § 240.10b-5. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

SECURITIES AND EXCHANGES COMMISSION RULE 14e-3(a), 17 C.F.R. SECTION 240.14e-3(a)

Reg. § 240.14e-3 (a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such persons shows that:

(1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and

(2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a), which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) to the contrary, the following transactions shall not be violations of paragraph (a) of this section:

(1) Purchase(s) of any security described in paragraph (a) by a broker or by another agent on behalf of an offering person; or

(2) Sale(s) by any person of any security described in paragraph (a) to the offering person.

(d)(1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section *except* that this paragraph shall not apply to a communication made in good faith,

(i) To the officers, directors, partners or employees of the offering person, to its advisors or

to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(2) The persons referred to in paragraph (d)(1) of this section are:

(i) The offering person or its officers, directors, partners, employees or advisers;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) or the issuer or persons in paragraph (d)(2)(ii); and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

TITLE 49, SUBTITLE IV, CH. 101
(THE INTERSTATE COMMERCE ACT, AS AMENDED);
49 U.S.C. Section 10101

§ 10101. Transportation policy

(a) Except where policy has an impact on rail carriers, in which case the principles of section 10101a of this title shall govern, to ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to provide for the impartial regulation of the modes of transportation subject to this subtitle, and –

(1) in regulating those modes –

(A) to recognize and preserve the inherent advantage of each mode of transportation;

(B) to promote safe, adequate, economical, and efficient transportation;

(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;

(D) to encourage the establishment and maintenance of reasonable rates for transportation, without unreasonable discrimination or unfair or destructive competitive practices;

(E) to cooperate with each State and the officials of each State on transportation matters; and

(F) to encourage fair wages and working conditions in the transportation industry;

(2) in regulating transportation by motor carrier, to promote competitive and efficient transportation services

in order to (A) meet the needs of shippers, receivers, passengers, and consumers; (B) allow a variety of quality and price options to meet changing market demands and the diverse requirements of the shipping and traveling public; (C) allow the most productive use of equipment and energy resources; (D) enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions; (E) provide and maintain service to small communities and small shippers and intrastate bus services; (F) provide and maintain commuter bus operations; (G) improve and maintain a sound, safe, and competitive privately owned motor carrier system; (H) promote greater participation by minorities in the motor carrier system; and (I) promote intermodal transportation; and

(3) in regulating transportation by motor carrier of passengers (A) to cooperate with the States on transportation matters for the purpose of encouraging the States to exercise intrastate regulatory jurisdiction in accordance with the objections of this subtitle; (B) to provide Federal procedures which ensure that intrastate regulation is exercised in accordance with this subtitle; and (C) to ensure that Federal reform initiatives enacted by the Bus Regulatory Reform Act of 1982 are not nullified by State regulatory actions.

(b) This subtitle shall be administered and enforced to carry out the policy of this section.

TITLE 49, SUBTITLE IV, CH. 113, SUBCHAPTER 1
(THE INTERSTATE COMMERCE ACT, AS AMENDED);
49 U.S.C. Section 11301

§ 11301. Authority of certain carriers to issue securities and assume obligations and liabilities

(a) In this section –

(1) "carrier" means a rail or sleeping car carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title (except a street, suburban, or interurban electric railway not operated as a part of a general railroad system of transportation), and a corporation organized to provide transportation by rail carrier subject to that subchapter.

(2) "security" means a share of capital stock, a bond, or other evidence of interest in, or indebtedness of, a carrier.

(b)(1) Subject to subchapter I of chapter 2A, chapter 2B, and subchapter I of chapter 2D of title 15, the Commission has exclusive jurisdiction to approve the issuance of securities by a carrier and the assumption of an obligation or liability related to the securities of another person by a carrier. A carrier may not issue securities or assume those obligations or liabilities without the approval of the Commission. No other approval is required. A security issued or obligation or liability assumed by a carrier in violation of this subsection or in violation of a condition prescribed by the Commission under subsection (d) of this section is void. However, a security or obligation issued or assumed under authority of this section is not void for failure to comply with a procedural requirement

of this section or other matter preceding entry of the order of the Commission.

(2) Paragraph (1) of this subsection does not apply to notes issued by a carrier if the notes mature not more than 2 years after their date of issue and total (with all then outstanding notes having a maturity of not more than 2 years) not more than 5 percent of the par value of the then outstanding securities of that carrier. If the securities do not have a par value, the par value of those securities is the fair market value on the date of issue. Paragraph (1) of this subsection applies to a subsequent funding of notes referred to in this paragraph.

(c)(1) A carrier issuing notes referred to in subsection (b)(2) of this section shall file a certificate of notification with the Commission by the end of the 10th day after they are issued. That notification must include substantially the same matter required by the Commission for an application for authority to issue other securities.

(2) A carrier that pledges, repledges, or otherwise disposes of a security referred to in an application for authority or a certificate of notification under this section as pledged or held unencumbered in the treasury of that carrier shall file a certificate of notification with the Commission by the end of the 10th day after it disposes of the security.

(d)(1) The Commission may begin a proceeding under this section on application of a carrier. Before taking final action, the Commission must investigate the purpose and use of the securities issue or assumption and the proceeds from it. The Commission may approve any part of the application and may require the carrier to comply with

appropriate conditions. After an application is approved under this section, the Commission may change a condition previously imposed or use that may be made of the securities or proceeds for good cause shown subject to the requirements of this section. The Commission may approve an application under this section only when if finds that the securities issue or assumption –

(A) is for a lawful object within the corporate purpose of the carrier and reasonably appropriate for that purpose;

(B) is compatible with the public interest;

(C) is appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier; and

(D) will not impair the financial ability of the carrier to provide the service.

(2) An application or certificate must be made under oath and signed and filed for the carrier by a designated executive officer who knows the matters stated in the application or certificate. On receipt of an application of a carrier under this section, the Commission shall have a copy of the application served on the chief executive officer of each State in which that carrier operates. The appropriate authorities of those States are entitled to be admitted as parties to a proceeding under this section to represent the rights and interests of their people and States.

(e) The Commission shall require a carrier that issues securities, including notes, under this section to submit reports to it. The reports must identify the disposition of those securities and the application of the proceeds from their disposition.

(f) This section does not imply a guaranty or obligation of those securities by the United States Government. This section does not apply to securities issued or obligations or liabilities assumed by the United States Government, a State, or an instrumentality or political subdivision of one of them.

TITLE 49, SUBTITLE IV, CH. 113, SUBCHAPTER III (THE INTERSTATE COMMERCE ACT, AS AMENDED);

49 U.S.C. Section 11341

§ 11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State

law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

TITLE 49, SUBTITLE IV, CH. 113, SUBCHAPTER III (THE INTERSTATE COMMERCE ACT, AS AMENDED);

49 U.S.C. Section 11343

§ 11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

> (1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.
>
> (2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e)(1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation

subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that –

> (A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and
>
> (B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the

merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

TITLE 49, SUBTITLE IV, CH. 113, SUBCHAPTER III (THE INTERSTATE COMMERCE ACT, AS AMENDED);

49 U.S.C. Section 11344

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that

chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that –

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by

interested parties within 30 days following receipt of such application.

TITLE 49, SUBTITLE IV, CH. 113, SUBCHAPTER IV (THE INTERSTATE COMMERCE ACT, AS AMENDED);

49 U.S.C. Section 11367

§ 11367. Application of other laws

(a) Section 14(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78n(a)) does not apply to a solicitation related to a proposed change under this subchapter.

(b) If the Interstate Commerce Commission finds an issuance of a security, that is an interest in a railroad equipment trust as defined in section 3(a)(6) of the Securities Act of 1933 (15 U.S.C. 77c(a)(6)), under this subchapter complies with section 11301 of this title, it is considered to be an issuance subject to section 11301 within the meaning of section 3(a)(6). Section 5 of that Act (15 U.S.C. 77e) does not apply to the issuance, sale, or exchange of certificates of deposit representing securities of, or claims against, a carrier that are issued by committees in proceedings under this subchapter. Those certificates and transactions under this subchapter are exempt from that Act (15 U.S.C. 77a et seq.).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAMUEL DEUTSCH, Plaintiff, -against- ROBERT G. FLANNERY, ROBERT C. MARQUIS, RICHARD W. STUMBO, JR., WALTER G. TREANOR, JOHN G. BANNISTER, WAYNE T. DONNELS, JOHN G. McDONALD, JUSTIN M. ROACH, JR., JOSEPH ROSENBLATT, THE WESTERN PACIFIC RAILROAD COMPANY, AND UNION PACIFIC CORPORATION, Defendants.	C 84 7928 SC COMPLAINT CLASS ACTION Plaintiff Demands Trial by Jury (FILED DEC 17 1984)

Plaintiff, by his attorneys, alleges upon information and belief, except as to ¶ 5, which is alleged upon knowledge:

Jurisdiction and Venue

1. The jurisdiction of this Court is based upon § 27 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78aa, and upon the principles of pendent jurisdiction.

2. The claims asserted herein arise under and pursuant to §§ 10(b) and 14(e) of the Exchange Act and the rules and regulations of the Securities and Exchange Commission promulgated thereunder and under the principles of the common law.

3. Venue is properly laid in this judicial district because many of the defendants reside or are found in this district and many of the principal acts and injuries alleged herein occurred in this district. Such acts included practices and conduct violative of the Exchange Act and the mailing and receipt within this district of materially false and misleading documents in connection with a tender offer.

4. In connection with the acts and conduct alleged in this complaint, the defendants, directly and indirectly, used the mails, the instrumentalities of interstate commerce, and the facilities of national securities exchanges.

The Parties

5. Plaintiff purchased Class A common stock of defendant The Western Pacific Railroad Company ("WesPac") prior to January 1980 and was the owner of 1300 shares thereof at that time. Plaintiff tendered and sold such stock for $20 per share pursuant to a tender

offer by defendant Union Pacific Corporation ("Union Pacific") announced on or about January 23, 1980.

6. Defendant WesPac is a Delaware corporation with its principal place of business in San Francisco, California. WesPac is a Class I rail carrier, with auxiliary truck operations, operating in the Western portion of the United States. It has significant land holdings. It is now a wholly owned subsidiary of defendant Union Pacific.

7. Union Pacific is a Utah corporation with its principal place of business in New York, New York. Union Pacific is the third largest railroad system in the United States with 22,000 miles of track. Its revenues in 1983 were $8.35 billion.

8. The individual defendants were all directors of WesPac in January 1980. In addition, defendant Robert G. Flannery was President and Chief Executive Officer and owned 5,001 shares of WesPac Class B common stock out of 10,000 shares outstanding. By virtue of such ownership he was able to and did elect a majority of WesPac's board of directors. Defendant Flannery controlled WesPac's board of directors, its policies and its practices.

Class Action Allegations

9. On or about January 23, 1980 Union Pacific, through a wholly-owned subsidiary, announced a tender offer for any and all shares of WesPac Class A common stock at $20 per share. The tender offer expired on March 3, 1980.

10. Plaintiff brings this action on his own behalf and as the representative of a class, in accordance with Rule

23 of the Federal Rules of Civil Procedure, consisting of all persons who owned WesPac Class A common stock on January 23, 1980 and tendered or sold their shares of WesPac in response to the aforesaid tender offer on or before March 3, 1980. Excluded from the class are the defendants, members of the immediate families of the individual defendants, and parents and subsidiaries of the corporate defendants.

11. There are hundreds of members of the class, thereby making joinder of all its members impracticable. As of January 1, 1980 WesPac had 1,065 shareholders of record. The vast majority of those shareholders tendered their stock and are thus members of the class. The actual number of class members and their addresses are unknown to plaintiff but will be readily determinable from the books and records of WesPac, Union Pacific or their agents.

12. Plaintiff is a member of the class, has sustained damages, is committed to pursuing this action, and has retained counsel experienced in actions of this nature. He has the same interest as all of the members of the class, his claims are typical of the claims of the members of the class, and he will fairly and adequately protect the interests of the class. Accordingly, plaintiff is an adequate representative of the class.

13. There are questions of law and fact common to the class which predominate over questions solely affecting individual members of the class. Among such questions of law and fact are:

Whether in connection with the tender offer any untrue statement of a material fact was made, or whether

any material fact necessary in order to make the statements made not misleading was omitted;

Whether the defendants participated in, conspired in or aided and abetted any fraudulent, deceptive or manipulative acts or practices in connection with the tender offer;

The duties owed by the defendants to members of the class;

The resulting liabilities of defendants; and

The measure of damages.

14. A class action is superior to other available means for a fair and efficient adjudication of the controversy.

Background Facts

15. In 1978 WesPac's predecessor was operating as a wholly-owned subsidiary of Western Pacific Industries, Inc. ("WPI"). In order to realize a substantial tax write-off (approximately $44 million), and for other reasons, WPI decided to sell its railroad subsidiary. Flannery, who was then president and chief executive officer of the predecessor, formed what is now WesPac to acquire the assets and business of the predecessor for $14,000,000, which amount was raised in a public offering. The plan called for the issuance of 1,400,000 shares of WesPac Class A common stock, and 10,000 shares of WesPac Class B stock. The Class B shareholders were entitled to elect a majority of the board of directors. All of the Class A stock was sold to the public at $10 per share in an underwritten offering on March 28, 1979, and 5,001 shares of Class B

stock was purchased by Flannery, also at $10 per share. WesPac as then constituted owned substantial railroad, real estate and trucking properties both directly and through subsidiaries.

16. Even prior to the public offering of WesPac, Flannery and the other defendants had been engaged in discussions with Union Pacific concerning the possible acquisition of WesPac by Union Pacific. As a result of those discussions, Union Pacific acquired an intimate and confidential knowledge of WesPac's businesses, including WesPac's real estate properties. Shortly after the public offering, in April 1979, Union Pacific purchased, through an affiliate, 139,800 shares, or approximately 9.9% of the outstanding shares of WesPac Class A common stock. In addition, between March and July of 1979, Chicago & Northwestern Transportation Co., a company with which Union Pacific had and has close affiliations, purchased 138,500 shares of the outstanding Class A common stock of WesPac. Defendant Flannery stated publicly "we welcome them as a stockholder."

17. Although the prospectus issued in connection with the public offering of March 28, 1979 stated that the WesPac board of directors had adopted a policy of declaring regular quarterly dividends in an amount of approximately 50% of net income, the director defendants decided in July 1979 to forego the declaration of an initial dividend even though the company earned $890,000, or 62¢ a share, in the quarter ended June 30, 1979, and was well able to pay dividends. In fact, up until the tender offer (and continuing to this day), the WesPac directors declared no dividends whatsoever even though the net income (pro forma) for 1979 amounted to $4,747,000, or

$3.33 per share. The passing of the dividends had the effect of depressing the market price of WesPac Class A stock which nevertheless rose from the $10 offering price to $14-1/2 immediately prior to the announcement of the tender offer.

18. All of the defendants recognized that WesPac was worth far in excess of its market value. Defendant Flannery was in a position to, and did, control WesPac. Aided and abetted by the director defendants, Flannery and Union Pacific devised a scheme whereby Flannery would trade his control position in WesPac for the top management position in Union Pacific Railroad Company, the principal wholly-owned subsidiary of Union Pacific, in return for which Union Pacific would acquire WesPac at a bargain price. As part of the arrangement certain officers and employees of WesPac sold to WesPac 135,500 options, which were not exercisable at the time of the tender offer, for $1,381,375. In return, defendants Marquis, Stumbo and Treanor recommended acceptance of the tender offer and agreed to surrender 1,000 shares each of Class B stock for $20 per share.

19. In furtherance of defendants' scheme, on or about January 23, 1980, Union Pacific offered to purchase any and all shares of WesPac at $20 per share net to the seller. In connection with this offer, the defendants caused to be sent to all holders of WesPac common stock a document (the "tender offer document") which solicited the tender of their shares and described, among other things, the business of WesPac, as well as the terms and conditions of the tender offer, the procedure for tendering shares, and the purpose of the offer. The tender offer expired on March 3, 1980.

20. The tender offer document was materially false and misleading and omitted to state necessary facts, as more particularly set forth in ¶¶ 21 through 24 below.

21. The tender offer document describes WesPac as a railroad which also provides related trucking services. It contains a condensed consolidated balance sheet as of December 31, 1979 which lists total assets of $145,614,000, net properties of $81,796,000 and a stockholders' equity, or net worth, of $18,034,000. The tender offer document thereafter states that the book value per share of the WesPac shares as of December 31, 1979 was $12.79. The tender offer document is materially false and misleading in the following respects:

(a) It nowhere states that included among the assets of WesPac were approximately 5,000 to 8,500 acres of land that were unrelated to the railroad operation of WesPac ("excess land"). The excess land was in addition to approximately 30,000 acres WesPac owned and considered as part of its railroad operations;

(b) It nowhere states that the excess land had a fair market value exceeding $150 million, but was carried on the books at approximately 10% of fair market value;

(c) It nowhere states that one of the principal reasons for the proposed acquisition by Union Pacific was to obtain title to the excess land;

(d) It nowhere states that Union Pacific specifically intended to systematically sell off portions of the excess land to generate cash for WesPac and Union Pacific and to offset operating railroad losses of WesPac [sic].

(e) It states that Flannery had agreed to sell his stock to Union Pacific's subsidiary at $20 per share, whereas in fact he sold his stock to Union Pacific at $23.20 per share.

In fact, in connection with a WesPac proxy statement issued on or about May 2, 1983, it has now been disclosed that during the period January 1, 1980 through May 2, 1983, WesPac, under the control of Union Pacific, sold 987 acres of the excess land under a systematic sales program, and that such excess land had a book value of $1,679,000 and that the sales proceeds generated were $54,611,000, or nearly $40 per share. During 1980 alone, WesPac sold land carried on its books at $270,000 for $9,397,000, negotiations for which took place, in part, during the pendency of the tender offer. That same proxy statement further discloses that, by reason of appraisals in the possession of WesPac and estimates made by the real estate department of WesPac, it presently appears that the balance of the excess land could be sold for approximately $100 million and that further sales are being contemplated. Thus, it has now become clear that the $12.79 book value per share for WesPac shares stated in the tender offer document was calculated by use of historical costs for the excess land, but at the time of the tender offer, the excess land alone had a fair market value of more than $100 per share. This material fact was known by defendants but not disclosed in the tender offer document.

22. The tender offer document states in bold letters: "The Board of Directors of the Company has unanimously consented to the Offer and recommended that the Company's stockholders accept the Offer because the directors regard the price as fair." However, as set forth

in ¶¶ 18 and 21 above, the directors could not possibly have regarded the price as fair and that was certainly not their reason for recommending acceptance of the offer.

23. The tender offer document failed to reveal the scheme referred to in ¶ 18 above, even though at the time of the tender Union Pacific had already agreed to the acquisition of Missouri Pacific Railroad and had reached an understanding with Flannery that he would receive a top management position in Missouri Pacific Railroad and/or Union Pacific Railroad.

24. The tender offer document stated that no dividends had ever been paid on the WesPac shares, but it failed to reveal that this was due to the scheme and conspiracy existing among the defendants.

25. The tender offer document disclosed that WesPac and Union Pacific had entered into an agreement of merger pursuant to which shareholders of WesPac would, upon the effectiveness of the merger, receive the same amount they could get by tendering their stock, namely $20 per share. However, it was also stated that the merger might not be consummated for several years. Stockholders were thus presented with the choice of tendering their stock and receiving $20 per share in early 1980 or waiting several years to receive the same amount. Pursuant to the defendants' scheme, the intended effect of this tactic was to coerce the stockholders to tender their shares whether or not they believed the price to be adequate. And in fact, out of 1,400,000 shares of Class A stock outstanding, 1,081,647 shares of the Class A common stock were acquired by Union Pacific pursuant to the tender offer.

26. WesPac and the individual defendants provided Union Pacific with a list of WesPac's shareholders of record for use in connection with the tender offer.

27. By early January 1980, Union Pacific had obtained control of Missouri Pacific Railroad. On July 1, 1982, defendant Flannery assumed the position of President of Missouri Pacific Railroad and, on December 22, 1982, defendant Flannery was elected to the additional position of President of Union Pacific Railroad.

28. On or about May 2, 1983 WesPac sent a proxy statement to its shareholders to vote on the approval of the merger with Union Pacific. Since Union Pacific then owned approximately 87% of the shares of WesPac, the approval of the merger was a foregone conclusion and in fact the merger was approved at the shareholders meeting on May 24, 1983 and immediately thereafter was effectuated.

29. The defendants' scheme was thus completed. Flannery had obtained his lucrative positions as Chief Executive of Missouri Pacific Railroad and Union Pacific Railroad. Union Pacific had obtained the valuable properties of WesPac, including not only its valuable connecting rail and associated business, but also the immensely valuable, although undisclosed, real estate.

30. Plaintiff and the other class members were unaware of the false statements and omissions referred to in ¶¶ 21 through 24 above at the time of the tender offer and did not learn of such falsities until long thereafter. In ignorance thereof plaintiff and the other members of the class relied, to their damage, on the tender offer document.

31. All of the defendants other than WesPac, by virtue of their positions as directors, controlling persons, and persons with confidential inside information concerning WesPac, stood in a fiduciary relationship to WesPac's shareholders.

First Cause of Action
(Violations of §§ 10(b) and 14(e) of the Exchange Act)

32. Plaintiff repeats and realleges the allegations of ¶¶ 1 through 31 above.

33. At the time that the defendants disseminated the tender offer document, they had actual knowledge of the materially false and misleading statements and the material omissions set forth in ¶¶ 21 through 24 above, as well as the coercive effect of the tender offer set forth in ¶ 25 above, and intended thereby to deceive and coerce plaintiff and the members of the class; or, in the alternative, defendants acted with such reckless disregard for the truth that they failed or refused to ascertain and disclose such facts as would reveal the materially false and misleading nature of the tender offer document although such facts were readily available to defendants. Said acts or omissions of defendants were committed wilfully or with reckless disregard for the truth. In addition, each defendant knew, or recklessly disregarded that material facts were being misrepresented or omitted, as described above.

34. In connection with the dissemination and publication of the tender offer document, defendants, directly and indirectly, by the use of the mails and the means and instrumentalities of interstate commerce:

(a) employed devices, schemes and artifices to defraud;

(b) made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading; and

(c) engaged in acts, practices and courses of conduct which operated as a fraud;

all in violation of § 10(b) and § 14(e) of the Exchange Act and Rule 10b-5 promulgated thereunder.

Second Cause of Action
(Violation of Common Law Duty)

35. Plaintiff repeats and realleges the allegations contained in ¶¶ 1 through 34 above.

36. Defendants had a fiduciary duty to plaintiff and the other members of the class which included the responsibility

(a) to treat them fairly; and

(b) to disclose to them all facts of a material nature.

37. By reason of the foregoing defendants violated their fiduciary duties to the plaintiff and the other class members and are liable to them. WesPac, which aided, abetted and participated in the breach of fiduciary duties, is similarly liable.

Sources of Information and Belief

38. The sources of plaintiff's information and belief include the following:

1. Documents filed with the Securities and Exchange Commission, including

(a) The prospectus of WesPac dated March 28, 1979;

(b) The tender offer document;

(c) The WesPac proxy statement dated May 2, 1983;

(d) Form 10-K's and proxy statements filed by WesPac during and for the years 1980 through 1983.

2. Material contained in Interstate Commerce Commission Finance Docket No. 30,000.

3. Material filed with the United States Court of Appeals for the District of Columbia Circuit in Appeal No. 82-2342.

4. Newspaper and periodical articles, including the following:

(a) *Wall Street Journal* of April 25, 1979;

(b) *Wall Street Journal* of May 7, 1979;

(c) *Wall Street Journal* of July 23, 1979;

(d) *Wall Street Journal* of July 31, 1979;

(e) *Wall Street Journal* of January 22, 1980;

(f) *Wall Street Journal* of March 4, 1980;

(g) *Wall Street Journal* of September 16, 1980;

(h) *Wall Street Journal* of May 4, 1981;

(i) *Wall Street Journal* of September 14, 1982;

(j) *Wall Street Journal* of December 23, 1982;

(k) *Wall Street Journal* of January 3, 1983;

(l) *New York Daily News* of May 20, 1983;

5. Investigation of Counsel.

WHEREFORE, plaintiff demands judgment against defendants as follows:

(a) determining that the instant action is a class action maintainable under Rule 23 F.R.Civ.P.;

(b) requiring the defendants to pay damages sustained by plaintiff and the class by reason of the acts and transactions herein alleged;

(c) awarding plaintiff the costs and disbursements of this action, including reasonable attorneys fees and experts fees;

(d) granting such other and further relief as this Court may deem just and proper.

DATED: December 14, 1984

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JURY DEMAND

Plaintiffs respectfully demand a trial by jury.

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